

**LIBRARY.**  
**SUPREME COURT, U. S.**

**APPENDIX**

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**In the**  
**Supreme Court of the United States**

OCTOBER TERM, 1972

—  
No. 72-1570  
—

**ROBERT H. DONNELLY,**  
PETITIONER,

*v.*

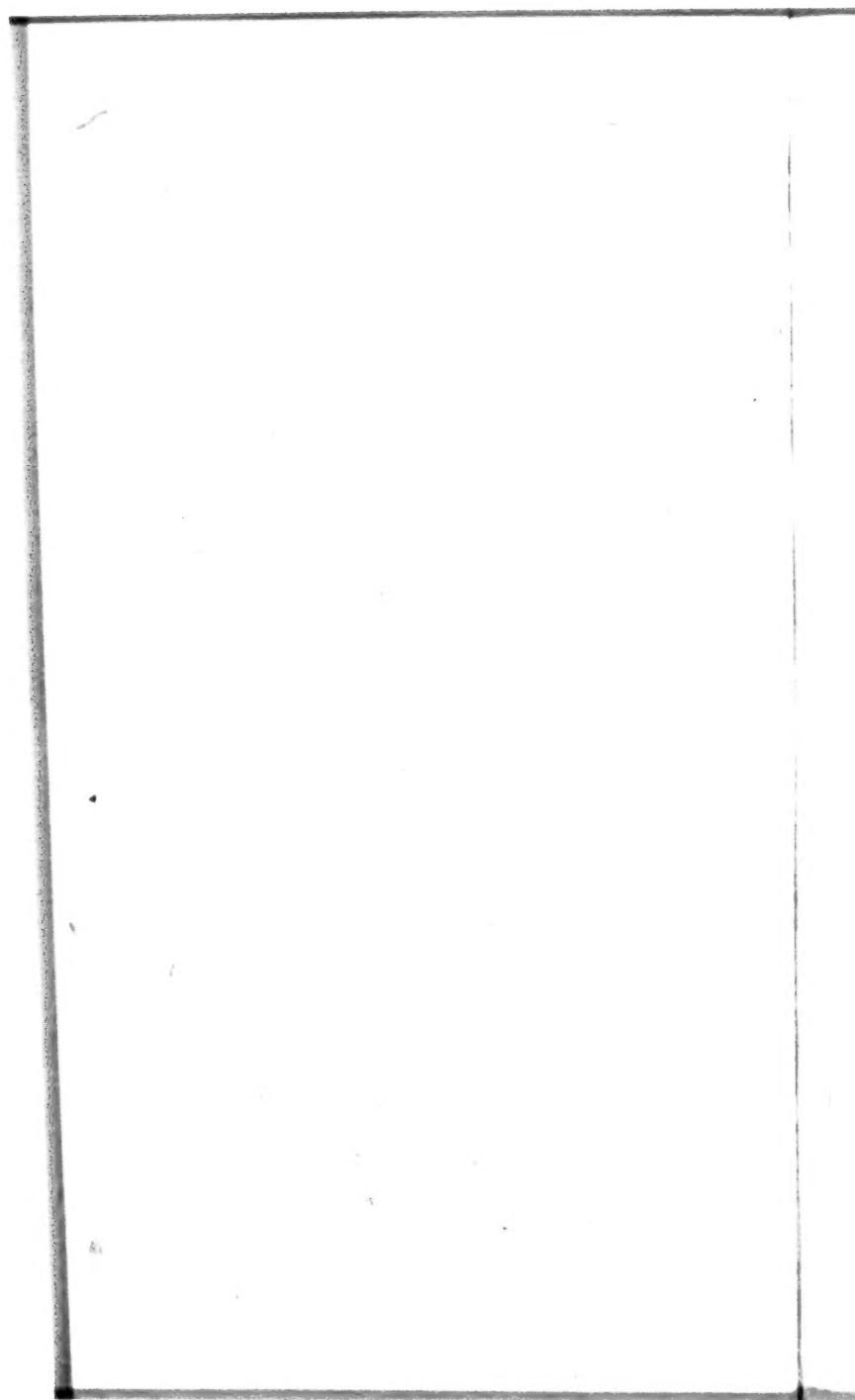
**BENJAMIN A. DECHRISTOFORO,**  
RESPONDENT.

—  
**ON WRIT OF CERTIORARI TO**  
**THE UNITED STATES COURT OF APPEALS**  
**FOR THE FIRST CIRCUIT**  
—

**Petition for Writ of Certiorari Filed May 23, 1973**

**Certiorari Granted October 13, 1973**

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COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT

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No. 77689

COMMONWEALTH

v.

BENJAMIN A. DeCHRISTOFORO

DOCKET ENTRIES

Charge—Ind.—Murder

Atty. for Deft.

PAUL T. SMITH, ESQ.

89 State Street

Boston, Mass.

No. of

Paper Date of Entry

Docket Entries

1. 1967, May 10 Indictment.
- 1967, May 10 Indictment ordered recorded and service ordered to be made upon defendant forthwith by order of Lappin, J. Notice sent to Chief Justice, Attorney General and Sheriff.
2. 1967, May 10 Certificate of Notice to the Department of Mental Health.
3. 1967, May 12 Request for Capias and Capias issued to the District Attorney.
4. 1968, Nov. 20 Return of service on defendant.
5. 1968, Nov. 20 Capias returned with service endorsed thereon.
- 1968, Nov. 20 Defendant is arraigned and stands Mute.  
A Plea of Not Guilty is entered by order of the Court. Defendant is ord-

ered held without bail or mainprise.  
Mittimus issued.

Thirty-five days allowed for the filing  
of Special Pleas.

6. 1968, Nov. 21 Mittimus—To Common Jail returned  
with service endorsed thereon.
7. 1968, Dec. 9 Defendant's Motion for Inspection of  
Grand Jury Minutes.
8. 1968, Dec. 9 Defendant's Motion to Inspect and  
Copy Police Department Reports.
9. 1968, Dec. 9 Defendant's Motion for Exculpatory  
Material.
10. 1968, Dec. 9 Defendant's Motion for Copies of Sci-  
entific Reports.
11. 1968, Dec. 9 Defendant's Motion to Inspect and  
copy Statements of the Defendant.
12. 1968, Dec. 9 Defendant's Motion for Names of  
Witnesses.
13. 1968, Dec. 9 Defendant's Motion for Particulars.
14. 1968, Dec. 9 Defendant's Motion for Autopsy Re-  
port.
15. 1969, Feb. 13 Defendant's Motion for Severance.
- 1969, Feb. 26 Defendant's Motion (see #15) After  
hearing, motion denied. Defendant's  
exceptions saved. By the Court,  
Spring, J.
- 1969, Feb. 26 Continued until April 22, 1969 for  
Trial.
- 1969, Feb. 26 Defendant remanded.
- 1969, Mar. 10 Habeas Corpus to receive issued.
- 1969, Mar. 10 Defendant's Motion (see #8) After  
hearing, motion allowed. By the  
Court, Good, J.
- 1969, Mar. 10 Defendant's Motion (see #9) After  
hearing, motion allowed. By the  
Court, Good, J.

- 1969, Mar. 10 Defendant's Motion (see #10) After hearing, motion allowed. By the Court, Good, J.
- 1969, Mar. 10 Defendant's Motion (see #11) After hearing, motion allowed. By the Court, Good, J.
- 1969, Mar. 10 Defendant's Motion (see #12) After hearing, motion allowed. By the Court, Good, J.
- 1969, Mar. 10 Defendant's Motion (see #13) After hearing, motion allowed. By the Court, Good, J.  
Commonwealth to File answers within Ten Days. By the Court, Good, J.
- 1969, Mar. 10 Defendant's Motion (see #14) After hearing, motion allowed. By the Court, Good, J.
- 16. 1969, Mar. 10 Habeas Corpus returned with service endorsed thereon.
- 17. 1969, Mar. 11 Defendant's Motion to Suppress filed late by leave of Court. By the Court, Good, J.
- 18. 1969, Mar. 11 Defendant's Motion for Severance, Number Two filed late by leave of Court. By the Court, Good, J.
- 19. 1969, Mar. 19 Commonwealth's Answers to Bill of Particulars.
- 20. 1969, Mar. 26 Commonwealth's Motion for Leave to Proceed with Trial under General Laws (Ter. Ed.) Chapter 277, Section 57A.
- 1969, Apr. 14 Continued until April 18, 1969.
- 1969, Apr. 18 Habeas Corpus to receive issued.
- 21. 1969, Apr. 18 **REPORTING EVIDENCE:** under the provisions of General Laws (Ter. Ed.) Chapter 278, Section 33A to G inclusive, as amended, the Superior Court appoints,

Santo J. Aurelio, Stenographer

- to take the evidence on Pre-Trial Motions. By the Court, Sullivan, J.
- 1969, Apr. 18 Defendant's Motion (see #7) denied without prejudice. By the Court, Sullivan, J.
- 1969, Apr. 18 Defendant's Motion (see #17) After hearing, motion denied. Defendant's exceptions saved. By the Court, Sullivan, J.
- 1969, Apr. 18 Defendant's Motion for Severance Number Two (see #18) motion denied. Defendant's exceptions saved. By the Court, Sullivan, J.
- 1969, Apr. 18 Commonwealth's motion (see #20) allowed. Defendant's exceptions saved. By the Court, Sullivan, J.
22. 1969, Apr. 18 Defendant's Motion to Strike Certain Answers to Bill of Particulars and for Further Answers. Motion allowed as per agreement in Open Court. District Attorney to make necessary changes upon his original Answer to the Defendant's Bill of Particulars. By the Court, Sullivan, J.
23. 1969, Apr. 18 Habeas Corpus returned with service endorsed thereon.
- 1969, Apr. 18 Defendant remanded.  
Continued until April 22, 1969.
24. 1969, Apr. 22 **REPORTING EVIDENCE:** under the provisions of General Laws (Ter. Ed.) Chapter 278, Section 33A to H inclusive, as amended, the Superior Court appoints,  
Alice McDonald—Santo J. Aurelio,  
Stenographers  
to take the evidence. By the Court,

- Sullivan, J. 1969, Apr. 22 Certificate in Re; Jurors. (see #43 case #77686)
- 1969, Apr. 23 Questions to Jurors, filed in Court. By the Court, Sullivan, J. (see #44 case #77686)
25. 1969, Apr. 23 Defendant's Challenge to the Petit Jury, filed in Court. Defendant's Challenge denied. Exceptions saved. By the Court, Sullivan, J.
26. 1969, Apr. 28 Defendant's Motion for Directed Verdict, filed in Court and after hearing, Motion denied. Defendant's exceptions saved. By the Court, Sullivan, J.
- 1969, Apr. 28 Defendant committed into the custody of the Sheriff of Suffolk County, Mitimus issued.
27. 1969, Apr. 28 Request for writ of Habeas Corpus and Habeas Corpus to receive issued to the Keeper of the Charles Street Jail.
28. 1969, Apr. 29 Habeas Corpus returned with service endorsed thereon.
29. 1969, Apr. 29 Defendant's Request for Instructions to the Jury, filed in Court. Defendant remanded.
30. 1969, Apr. 29 Request for writ of Habeas Corpus and Habeas Corpus to receive issued to the Keeper of the Charles Street Jail.
- 1969, Apr. 30 Custody of Sheriff of Suffolk County is revoked. Jurors — Burton F. Reynolds and Donald N. Goldthwaite were excused from the panel after the Judges charge and before deliberation in accordance with Chapter 234,

Section 26B of the General Laws, as amended.

31. 1969, Apr. 30 Question from Jury, filed in Court.  
1969, Apr. 30 **VERDICT—GUILTY OF MURDER IN THE FIRST DEGREE** with recommendation that death penalty not be imposed.
32. 1969, Apr. 30 Defendant's Waiver of Mental Examination.  
1969, Apr. 30 **COMMONWEALTH MOVES FOR SENTENCE.**  
1969, Apr. 30 **SENTENCE—**Massachusetts Correctional Institution Walpole for a Term of **LIFE**. This sentence is deemed by the Court to have commenced on November 20, 1968. The defendant having been in confinement one hundred and sixty-two days.  
Mittimus issued. By the Court, Sullivan, J. -  
1969, May 1 Copy of indictment mailed to Superintendent at Massachusetts Correctional Institution, Walpole.
33. 1969, May 8 Mittimus to Massachusetts Correctional Institution, Walpole, returned with service endorsed thereon.
34. 1969, May 13 Defendant's **CLAIM OF APPEAL**. Notice mailed to Judge Sullivan and District Attorney.
35. 1969, May 14 Defendant's Motion for **NEW TRIAL** and Affidavit. Copy of Motion mailed to Judge Sullivan.
36. 1969, May 20 **ORDER**: it is hereby ordered that Santo J. Aurelio, Stenographer designated by the Court prepare four



- copies of the Transcript of Testimony (on Pre-Trial Motions) heard on April 18, 1969 under the provisions of Chapter 278, Section 33A to H of the General Laws. By the Court, Sullivan, J.
37. 1969, May 20 ORDER: it is hereby ordered that Alice C. McDonald and Santo J. Aurelio, Stenographers designated by the Court prepare two copies of the Transcript of Testimony, under the provisions of Chapter 278, Section 33A to H of the General Laws. By the Court, Sullivan, J.
  38. 1969, May 30 Request for writ of Habeas Corpus, Habeas Corpus to receive issued to the Superintendent, Massachusetts Correctional Institution, Walpole.
  39. 1969, July 9 Request for writ of Habeas Corpus and Habeas Corpus to receive issued to the Superintendent, Massachusetts Correctional Institution, Walpole.
  40. 1969, July 16 Request for writ of Habeas Corpus and Habeas Corpus to receive issued to the Superintendent, Massachusetts Correctional Institution, Walpole.
  41. 1969, July 17 Mittimus committing defendant into custody of Sheriff of Suffolk County returned with service endorsed thereon.
  42. 1969, July 18 Habeas Corpus returned with service endorsed thereon.
  - 1969, July 18 Defendant's Motion (see #35) continued to September 1969 list for hearing.

- 1969, July 18 Defendant remanded.
43. 1969, July 22 Habeas Corpus returned without service.
44. 1969, Oct. 24 Request for writ of Habeas Corpus and Habeas Corpus to receive issued to the Superintendent of the Massachusetts Correctional Institution, Walpole.
45. 1969, Nov. 6 Request for Writ of Habeas Corpus and Habeas Corpus to receive issued to the Superintendent of the Massachusetts Correctional Institution, Walpole.
46. 1969, Nov. 10 Habeas Corpus returned without service.
47. 1969, Nov. 18 Request for writ of Habeas Corpus and Habeas Corpus to receive issued to the Superintendent of the Massachusetts Correctional Institution, Walpole.
48. 1969, Nov. 18 Habeas Corpus returned without service.
49. 1969, Nov. 24 Reporting Evidence: under the provisions of General Laws (Ter. Ed.) Chapter 278, Section 33A to G inclusive, as amended, the Superior Court appoints,  
     Mary C. Haran, Stenographer  
     to take the evidence. (On Motion for New Trial.) (Sullivan, J.)
- 1969, Nov. 24 Defendant's Motion (see #35) after hearing, motion taken under advisement.
- 1969, Nov. 24 Defendant remanded.
50. 1969, Nov. 24 Habeas Corpus returned with service endorsed thereon.

- 1969, Dec. 2 Defendant's Motion for New Trial (see #35) after examination of Affidavits and after hearing the Motion for New Trial is denied. By the Court, Sullivan, J.  
Notice mailed to Attorney and delivered to District Attorney.
51. 1969, Dec. 2 Motion to Amend Defendant's Motion for New Trial and Affidavit, after hearing Motion denied. By the Court, Sullivan, J.
52. 1969, Dec. 2 Affidavit of Fred DeChristoforo.
53. 1969, Dec. 2 Affidavit of Carmen Gagliardi.
54. 1969, Dec. 2 Affidavit of Joseph Carl DiFronzo.
55. 1969, Dec. 2 Affidavit of Paul T. Smith.
56. 1969, Dec. 8 Defendant's Claim of Exception to the Denial of Motion for New Trial. Notice mailed to Judge Sullivan and delivered to District Attorney.
57. 1969, Dec. 9 Defendant's Claim of Appeal to the denial of his Motion for New Trial. Notice mailed to Judge Sullivan and delivered to District Attorney.
58. 1969, Dec. 12 ORDER: it is hereby ordered that Mary C. Haran, Stenographer designated by the Court prepare four copies of the Transcript of Testimony (on Motion for New Trial) under the provisions of Chapter 278, Section 33A-33H.
59. 1970, Feb. 25 Two sets, one volume in each set of the "Transcript of Evidence" (on Pre-Trial Motions) delivered to the office of the Clerk of Courts this day.

- 60. 1970, Feb. 25 Two sets, seven volumes in each set of the "Transcript of Evidence" delivered to the office of the Clerk of Courts this day.
- 61. 1970, Feb. 25 Two sets, one volume in each set of the "Transcript of Evidence" (Hearing on Motion for New Trial) delivered to the office of the Clerk of Courts this day.
- 62. 1970, May 21 Summary of the Record.  
Written notice sent to Counsel of Record and District Attorney.
- 63. 1970, May 21 Certificate of Calvin A. Burger, Assistant Clerk of the Superior Court of the Completion of the Summary of the Record and notice sent to Counsel of Record and District Attorney.
- 64. 1970, May 26 Defendant's Assignment of Errors.

**COMMONWEALTH OF MASSACHUSETTS**

SUPERIOR COURT

[Title Omitted in Printing]

**INDICTMENT**

**Docket Number 77689**

**COMMONWEALTH**

vs.

**BENJAMIN A. DE CHRISTOFORO**

On the eighth day of the May Sitting, A. D., 1967, the Grand Jury for the County of Middlesex returned the following:

**COMMONWEALTH OF MASSACHUSETTS**

**MIDDLESEX, TO WIT:**

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, on the first Monday of May in the year of our Lord one thousand nine hundred and sixty-seven

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Benjamin A. DeChristoforo on the eighteenth day of April in the year of our Lord one thousand nine hundred and sixty-seven at Medford, in the County of Middlesex aforesaid, did assault and beat one Joseph F. Lanzi, with intent to kill and murder him, and by such assault and beating did kill and murder Joseph F. Lanzi.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

JOHN F. GRIFFIN

Foreman of the Grand Jury.

JOHN J. DRONEY

District Attorney

---

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

[Title Omitted in Printing]

**INDICTMENT**

**Docket Number 77690**

COMMONWEALTH

vs.

BENJAMIN A. DE CHRISTOFORO

On the eighth day of the May Sitting, A. D., 1967, the Grand Jury for the County of Middlesex returned the following:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, TO WIT:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within and for the County of Middlesex, for the transaction of Criminal Business on the first Monday of May in the year of our Lord one thousand nine hundred and sixty-seven

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present, That Benjamin A. DeChristoforo on the eighteenth day of April in the year of our Lord one thousand nine hundred and sixty-seven at Medford, in the County of Middlesex aforesaid, did unlawfully carry under his control in a vehicle a firearm as defined in section one hundred and twenty-one of chapter one hundred and forty, without authority and permission so to do.

Second Count

AND THE JURORS aforesaid for the COMMONWEALTH OF MASSACHUSETTS on their oath aforesaid, do further present That Benjamin A. DeChristoforo on the eighteenth day of April in the year of our Lord one thousand nine hundred and sixty-seven at Medford, in the County of Middlesex aforesaid, did unlawfully carry under his control in a vehicle a firearm as defined in section one hundred and twenty-one of chapter one hundred and forty, without authority and permission so to do.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

JOHN F. GRIFFIN  
Foreman of the Grand Jury.

JOHN J. DRONEY  
District Attorney

---

## COMMONWEALTH OF MASSACHUSETTS

## SUPERIOR COURT

[Title Omitted in Printing]

[EXCERPTS FROM STATE TRIAL TRANSCRIPTS]

[333]

PATRICK CARR, SWORN

*Direct Examination by Mr. Irwin:*

Q. Sir, would you identify yourself please. A. Patrick J. Carr, Police officer, City of Medford.

[334] The Court: Speak up, Officer Carr. Please speak into the microphone so you can be heard by everyone.

Q. Would you tell us your home address, sir. A. 54 Everett Street, Medford, Mass.

Q. And, how long have you been a police officer in the City of Medford? A. Eight years, and ten month.

Q. Directing your attention back to the early morning of April 18, 1967, were you on duty that morning? A. Yes, I was.

Q. What were your duties that particular morning and what time did you commence them? A. I was assigned to Sector car, Sector 1. I started working that morning at 12:15 a.m.

Q. And, you were operating a cruiser, were you? A. Yes, I was.

Q. Was there somebody in that cruiser with you? A. Yes, there was.

Q. Who was that? A. Officer Brady.

Q. Officer Carr, at sometime that morning, April 18, 1967, did your duties take you down Middlesex [335] Avenue in Medford in the direction of Malden? A. Yes, they did.

Q. Could you tell the jury, if you would, please, approximately what time that was? A. This was 3:55 a.m. on the morning of Tuesday, April 18, 1967.

Q. Where were you on Middlesex Avenue that morning?

What were you doing on Middlesex Avenue? A. I was checking buildings and patrolling the area.

Q. And, would you take a look behind you, Officer, over your left shoulder and take a look at that particular map behind you which is marked already as Exhibit 1 in this trial, and see whether or not you are familiar with that? A. Yes, sir, I am.

Q. Now, can you take that pointer that's in front of you on the stand there, keeping your voice up, and tell the jury if you would please where you were patrolling?

A. I was patrolling this area in here. This is Middlesex Avenue, up in here; down this section here are businesses. At 3:55 that morning, after checking this area, I continued on Middlesex [336] Avenue, into Malden, on Highland Avenue. I proceeded up to this intersection, Medford Street, which is in Malden. I made a left turn, went up Medford Street, to get back over to the City of Medford.

At this point, approximately this point, a Ford, color red, passed us in the opposite direction. I looked at this car; I noticed there were four men in this car, as it passed. I proceeded up a little further and I looked back and I could see this car make a right turn onto Highland Avenue.

I then turned the cruiser around, proceeded back in the same direction. I made a right turn on Highland Avenue. As I made the turn, I could see the taillights of this car down here at the bend in this road.

Q. Now, Officer, before you get down to that point: You say at some point up here you turned your cruiser around after you spotted this car? A. Yes, sir.

Q. What was it that you observed about the other car that made you turn your cruiser around? [337] A. There were four men in this car; they appeared to be young, and because of the hour of the morning they aroused my suspicions.



Q. With reference to the traffic controls there, could you tell us what they were that night? A. Yes, sir. It was a flashing red light.

Q. Was that with reference to traffic on Medford Street? A. Yes, sir.

Q. Coming into Highland Avenue? A. Yes, sir.

Q. Did you observe whether or not this particular vehicle stopped for that flashing red light? A. It did not.

Q. Now, when you got back to the corner and took a right on Highland Avenue, would you tell the jury what you were able to observe, if anything? A. After I made the right turn onto Highland Avenue, I observed taillights of this car down here at the bend in the road. I proceeded down Highland Avenue. I accelerated up to sixty miles an hour. When I made the bend at the turn, right here, there were no automobiles coming or going in either [338] direction. I proceeded on up to this point where I noticed tire tracks in the wet pavement.

I continued passed Third Street. This is where I saw these tire tracks leading from Middlesex Avenue onto Third Street.

Q. Officer Carr, would you stand back a little bit more so counsel can see where you are pointing to, please. A. I continued passed Third Street. I made a left turn down Fourth, where about half-way down I shut the lights out; continued on down. A little further down I observed this Ford pass Fourth Street on Cradock Avenue with its lights out.

I continued on down, made a right turn onto Cradock Avenue, and a right onto Fifth Street. As I made the right turn I saw this car stop in front of No. 6 Fifth Street. The car was heading in this direction, it was facing Middlesex Avenue, parked on the left-hand side of the street.

I pulled alongside this car, just a little past it and stopped the cruiser.

Q. Now, would you turn back here so we can hear you [339] in the microphone.

When you pulled abreast of that car, what did you do then, Officer Carr? A. I stepped out of the cruiser with my partner, Officer Brady.

Q. Would you tell the jury, if you would, please, what the weather was like that night? A. It was raining very heavy.

Q. What were you wearing? A. I was wearing my dress blue uniform.

Q. And, when you got out of the car were you aware at that time where this other car was parked with reference to numbers on Fifth Street? A. Yes, sir.

Q. Where was it parked? A. It was parked in front of No. 6 Fifth Street.

Q. And, as you got out of the cruiser, with your partner, John Brady, would you tell the jury if you would, please, what you observed when you got out of the cruiser. A. As I stepped out of the cruiser, the operator of this car, this Ford, stepped out onto the sidewalk.

[340] Q. Did you see what door he got out of? A. Yes, sir, he stepped out of the left front door, the driver's side of the car.

Q. Did you recognize this particular man? A. Yes, sir, I did.

Q. Did you know him by name? A. Yes, sir, I did.

Q. Who was he? A. Carmen Gagliardi.

Q. And, is that Carmen Gagliardi in the courtroom today? A. Yes, sir, he is.

Q. Would you indicate where he is seated in the courtroom. A. He is sitting in the dock to my left.

Mr. Irwin: May the record indicate that the witness has identified the defendant Gagliardi.

Q. Now, at this point was there anybody else out of that car? A. No, sir.

Q. Did you then have some conversation with the defendant Gagliardi? A. Yes, sir, I did.

[342] Q. At that time, were you under the impression — Mr. Balliro: I object.

Q. Did you know where Mr. Gagliardi lived? A. I knew he lived in the area but I didn't know which house.

Q. And, as a result of your investigation did you find that he actually lived at No. 11 Fifth Street? A. Yes, sir.

Q. Now after you saw Gagliardi go up to No. 9 Fifth Street, what did you do then, Officer Carr? A. I returned to the cruiser. I opened the door and I reached in and I took out a light, what we call a wheat lamp. It's a light run on a battery, has a lens of four or five inches in diameter.

Q. It is called a wheat lamp? A. A wheat lamp.

Q. W-h-e-a-t? A. Yes, sir.

[343] Q. All right. A. I then turned and I shined the light into the front of the car, and I saw a man in the front of the car with his head slumped back and to the left. He appeared to me to be asleep.

Q. After making this observation what did you do? A. I directed my attention to the two men in the back of the car. I asked these men if they would step out of the car.

Q. Where were you standing where you asked these two men to step out of the car? A. At the side of the Ford, the left side, and at the rear of the police car.

Q. Were you in the street? A. Yes, sir, I was.

Q. And, which way was the Ford headed with reference to Middlesex Avenue? A. The Ford was heading in the direction of Middlesex Avenue. Actually, the Ford was parked on the wrong side of the street.

Q. Headed toward Middlesex Avenue? A. Yes, sir.

Q. Now, you were standing in the street when you spoke to these two men in the back?

[356] (The Court came in at 11:45 a.m./The jury is now present. Both defendants were present.)

The Court: All right, Mr. Irwin.

Q. (Mr. Irwin, continuing direct) Officer Carr, I think we were at the point where you went to the rear door of this car after having got a wheat lamp, what you described as a wheat lamp, and you went to the rear, right rear door of this car where the window was turned down, and you spoke to two people in it, is that right? A. Yes, sir.

Q. And those two people were who? A. Mr. Frank Oreto and Mr. Benjamin DeChristoforo.

Q. All right. Is Mr. DeChristoforo here in the courtroom? A. Yes, he is.

Q. Would you indicate where he is seated? A. Yes. He is seated next to Mr. Gagliardi in the box (indicating), to my right.

Q. All right.

Mr. Irwin: I would like the record to show that he identified him in the courtroom, [357] the defendant DeChristoforo.

The Court: It may so reflect.

Q. Now, did these men get out of the car at your request? A. Yes, sir.

Q. All right. And would you explain to the jury the manner in which they got out of the car? Who came first?

A. Both men left the car and got out of the car from the right rear door. Mr. Frank Oreto was the first one out of the car, followed by Mr. Benjamin DeChristoforo on the same side of the car.

Q. All right. Now, I think in your testimony with reference to Mr. Gagliardi you indicated that you knew Mr. Gagliardi before that night, is that right? A. Yes, sir.

Q. Did you know either one of these two men by name?

A. In the back of the car?

Q. Yes. A. No, sir.

Q. Now, at this point when they got out of the car, did you have some conversation with Mr. DeChristoforo or Mr. Oreto? [358] A. Yes, I did.

Q. At this point Mr. Gagliardi had walked off in the direction of 9 — A. Yes, he had.

Q. Would you tell the jury, if you would, please, what conversation you had with Oreto and with DeChristoforo at that point?

Mr. Balliro: My objection, if Your Honor please.

The Court: Your objection is overruled and your rights are saved.

EXCEPTION No. 52

Mr. Balliro: I would ask Your Honor for limiting instructions with regard to this testimony.

The Court: I decline to give limiting instructions.

Mr. Balliro: My exception.

EXCEPTION No. 53

A. I asked both the men who got out of the back of this car for identification. They said they had none. I asked them who they were. Mr. Frank Oreto gave me a name at the time.

Q. What did he tell you his name was? A. He said his name was Joseph Rigo from Boston. [359] I asked Mr. DeChristoforo who he was. He gave me a name.

Q. Do you remember what name it was that he gave you? A. No, sir, I don't.

Q. All right. Do you remember whether it was DeChristoforo or not? A. No. It wasn't DeChristoforo.

Q. And you're sure of that? A. Yes, sir.

Q. All right. What else did you say to these two at that time, if anything? A. I asked who the man in the front seat was.

Q. Now, did either one of those gentlemen answer that?  
A. Yes, sir.

Q. Well, — A. Mr. DeChristforo answered.

Q. And what did he say to you in reply to your question of who the man in the front seat was? A. He said his name was Johnny Simeone from Boston. In regards to what had happened to him, his reply was that they were involved in a fight in a joint in Revere and that he would be all right. They were going to take him to a hospital. [360] Q. All right. A. And that he wished to join Mr. Gagliardi at his house, and he walked away in the same direction that Mr. Gagliardi did.

Q. All right. Now, would you tell us, if you would, please, what you did after Mr. DeChristoforo walked away in the direction that you saw Carmen Gagliardi go? What did you do next? A. I directed my attention back to the third man called Frank Oreto, and with my partner, John Brady, we walked to the other side of this car, up onto the sidewalk. I shined the light into the rear of this car, and the light hit a small derringer on the rear floor of this car. This gun was on the floor behind the driver's seat. I moved the light around and I saw another gun on the seat where Mr. Frank Oreto had been sitting. I opened the door, removed both guns, and I asked Mr. Oreto if either of these guns belonged to him, and he said: no. I took the guns and I placed them in the cruiser and I returned. I opened the driver's door of this car and I went inside. I leaned inside and I examined the man in the front seat, who is now known to us as [361] Joseph Lanzi.

I took my left hand and I put it on the man's chest, He was not breathing. I removed my hand and there was blood on it. In my opinion at this time this man appeared to be dead to me. I turned to my partner, Officer Brady, and I asked John Brady if he would examine this man

himself, which he did. He went into the car and he come out and he said in his opinion he thought the man was dead.

We then placed the remaining party, Mr. Frank Oreto, under arrest.

Q. All right. Did you have an occasion at this point, Officer Carr, to communicate with the Medford Police Station as a result of what you found then? A. Yes.

Q. All right. And at some time, in response to that communication, did other police officers come to the scene? A. Yes, sir, they did.

Q. All right. And you indicated that you took the remaining person known to you as Frank Oreto, to the Medford Police Station? [362] A. Yes, sir.

Q. All right. Up until that time, he had identified himself to you as Joseph Rigo, is that correct? A. Yes, sir.

Q. I show you this picture. Would you look at that photograph, if you would, Officer? Do you recognize the person depicted in that photograph? A. I do.

Q. All right. And do you recognize who he is? A. Yes, sir, I do.

Q. Will you tell us who he is, please? A. This is a picture of Frank Oreto.

Q. All right. And is that the man that you put under arrest there that morning? A. Yes, sir, it is.

Q. All right. And does that fairly represent, Officer Carr, the way he appeared in the police station after you took him to the police station? A. He was wearing different clothes.

Q. All right. So this photograph shows him after some of his clothing had been removed? A. Yes.

Q. What type of clothing had he worn? A. He had worn a topcoat.

. . .

[366] Mr. Balliro: I object.

The Court: Well, is Oreto going to take the stand?

Mr. Irwin: I don't propose to call Mr. Oreto. The defendants may.

Mr. Balliro: I object to that statement.

Mr. Smith: Yes.

The Court: Well,—

Mr. Balliro: The Commonwealth has the burden of proof, I might say, in this case.

Mr. Irwin: We are fully aware of what our burden is.

Mr. Balliro: I don't want to get into colloquy.

The Court: Come over here.

(Bench conference, during which the following transpired:)

The Court: Mr. Irwin, I would like to hear you in support of your question. Oreto is not here on trial.

Mr. Irwin: I understand that, if Your Honor please.

The Court: His case has been disposed of.

\* \* \*

[380] (William Cummings withdrew from the courtroom.)

Q. Officer Carr, I draw your attention to this particular weapon here which is for the purpose of the record a Rohm derringer, two shot pistol.

Have you ever seen that weapon before? A. Yes, I have.

Q. Where? A. On the rear floor of a 1967 Ford G73-751. This car was parked on Fifth Street of which the defendants Mr. Gagliardi and DeChristoforo got out.

Q. You say the gun was on the rear floor. A. Yes, it was.

Q. Can you tell the jury where on the rear floor? A. On the rear floor behind the driver, the driver's seat.

Q. And, I take it then that would be in front of the left passenger side of the rear, is that correct? A. Yes, sir, it was.

Q. On the floor? A. On the floor.



Q. Could you tell us anything else about the gun [381] as you saw it that particular morning on the floor of that car? A. After removing the gun from this car I noticed that this gun was in a half-cocked position.

Q. Could you show the jury what you mean by that. A. Yes, sir. The gun was in this position, like this: the handle being half cocked back. In order to fire it, you would continue back and squeeze the trigger.

Mr. Irwin: I offer this.

The Court: Do you object?

Mr. Smith: No objection.

The Court: It may be marked as an exhibit. I think this is Exhibit No. 2.

(Gun received and marked Exhibit No. 2)

Q. What did you do with this particular weapon which is marked Exhibit 2 right now? A. I turned that gun over to William Cummings of the State Police at the Medford Police Station.

Q. On the same day? A. Yes, sir, on the same morning, it was around six o'clock.

[382] Q. At the Medford Police Station. A. Yes, sir.

Q. Was Lieutenant Collins present at that time? A. Captain Collins was, yes, sir.

Q. Now I show you this weapon here. Would you tell us if you would please whether or not you can identify that? A. Yes, sir. This was the same gun that was in the car. This was on the rear seat where Mr. Oreto had been sitting.

Q. At the time, this gun was actually on the seat in the rear? A. That is right.

Q. You took that out of the car together with Exhibit 2, is that right? A. That's right.

Q. Did you make any examination of either one of these weapons to see whether or not they were loaded? A. I did not, no.

Q. You just took them, and put them in the cruiser is that correct? A. Yes, sir.

\* \* \*

[385] Q. Did you search another building, numbered 11 Fifth Street? A. Yes, sir, I did.

Q. In the company of other police officers, I assume? A. Yes, sir.

Q. Did you find Carmen Gagliardi on those premises? A. I did not.

Q. Or, did you find Benjamin DeChristoforo on those premises? A. No, sir.

Q. Now, you say you learned at some time that Mr. Gagliardi actually lived at 11 Fifth Street, is that right? A. Yes, sir.

Q. You saw him go up to the door at No. 9? A. No. 9.

Q. Did you make a determination through your investigation that actually Mr. Gagliardi never went into No. 9 that night? A. Yes, I did.

Q. And that he actually never went into No. 11 that night? [386] A. Yes, sir.

Q. Did you have then an occasion to examine the area down between No. 9 and 11 Fifth Street? A. Yes, I did.

Q. Did you follow it through to Fourth Street? A. Yes, sir.

Q. Tell the jury if you would please what you observed in that area. A. Between No. 9 and 11 Fifth Street there is a space between the two houses. You can walk between the two into the rear yard, and I observed in the rear yard footprints in the soft earth and there is a fence, a picket fence in the back of a house No. 10 Fourth Street which backs up to this property, and there was a gate in this fence and this gate was open.

Q. Was it raining heavily at this time? A. At this particular time?

Q. Yes. A. No, not too heavy.

Q. Was the area muddy? A. Yes, sir, it was.

Q. Did you make a search of Fourth Street and the neighboring streets and yards and so on [387] and so forth? A. Yes, sir.

Q. Did you ever see DeChristoforo or Gagliardi after that night? A. After that night?

Q. Right. A. No, sir.

Q. I show you a photograph, Officer Carr, would you take that and examine it please. Would you tell us if you would sir, whether or not that fairly represents the position of the body of Joseph Lanzi as you checked it that morning to see whether he was dead or alive? A. Yes, it does.

Mr. Irwin: I offer it.

Mr. Smith: No objection.

Mr. Balliro: No objection.

The Court: It may be marked Exhibit No. 4.

(Photograph received and marked Exhibit No. 4.)

Mr. Irwin: I request the Court's permission to show Exhibit 4 to the jury.

The Court: Yes.

. . .

[393] Q. All right. And, as I understand it, — just yes or no — you had some conversation with Oreto in the car on the way to the police station? A. Yes.

Mr. Irwin: No other questions.

*Cross-Examination by Mr. Smith:*

XQ. Officer, what was the speed of this automobile at the time you first saw it? A. I would estimate the speed between 20 and 30 miles an hour.

XQ. When you first saw it? A. Yes, sir.

XQ. Well, was that when it was taking the turn around by that flashing light? A. No. This was before the car made the turn. This is when I first saw the car.

XQ. And what was the speed of the car, if you know, at the time it made the turn? A. I would estimate the speed at between 15 and 20 miles an hour.

XQ. So that it slowed down? A. Yes, sir.

. . .

[399] XQ. The man whom you now identify as Mr. DeChristoforo? A. Yes, sir.

XQ. Well now, when you got to the automobile after Mr. Gagliardi had left the vicinity, can you tell us, as precisely as you reasonably can, where Mr. DeChristoforo was seated in the automobile? A. He was seated behind the driver.

XQ. So that would you say that he was seated to the extreme left of the passenger side of the automobile? A. That's right.

XQ. And where would you say Mr. Oreto was seated? A. He was seated next to him behind the dead man, Mr. Lanzi.

XQ. And when you say, "behind him", was he, to the best of your memory, directly behind him or was he somewhat — was he behind him and somewhat to the right of the deceased? A. I would say he was right behind him.

XQ. Directly behind him. And the man who you saw in the front seat who later turned out to be Mr. Lanzi, the deceased, whereabouts in the front seat was he sitting? [400] A. He was sitting on the passenger side of the car.

XQ. Now, about how close, if you recall, to the right front door of the passenger side of the car? A. He was more, sitting more to the center of the seat than the right door.

XQ. Then as you observed him, Lanzi appeared to be sitting about in the center of the front seat of the car? A. Not in the center. He was sitting on the passenger

side in the seat, but more to the center of the seat than to the right door.

XQ. Now, this automobile, does it have one large cushion or is it separated into bucket seats? A. One large —

XQ. One large cushion. I show you Exhibit 4 and ask you to use that exhibit, to look at that exhibit, and then tell us whether you can give us an estimate, your best estimate or best judgment, sir, of the distance between the left side of the body of Lanzi and the left door on the driver's side? A. I would say it's about three feet.

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[405] XQ. And, asking you questions while you were testifying under oath? A. That's right.

XQ. Now, do you recall Mr. Irwin asking you: Did Oreto answer when you asked him what his name was? And, you answered: He did. And, then the question: What name did he tell you?

Mr. Irwin: I object, if your Honor please.

The Court: What is the objection?

Mr. Irwin: The objection is that I have no objection, of course, to the proper use of this, but he is now proceeding to read testimony from some other occasion and some other trial; and I suggest respectfully to the Court that the only reason he can do that is to show that the witness made a prior inconsistent statement. And, the only way to do that is to put the question and get the answer from the witness and then show him what his testimony allegedly was in the District Court rather than counsel reading it.

The Court: Of course, that's the proper way to do it. You can ask him —

Mr. Smith: I will ask him the specific [406] question. I was only doing this by way of preface to the next question.

XQ. Then don't you recall being asked: "Did you have

any further conversation with Mr. Oreto?" And, you said that you did. And, you were asked: "Would you tell us if you would, please, what that was?" And, your answer: "I had asked Mr. Oreto and the other man who the fellow was in the front seat." And the question asked of you was: "Did Mr. Oreto answer that?" Answer: "He did." Question: "Would you tell us what he said when you asked him who the fellow in the front seat was?" Answer: "He said his name was Johnny Simeone."

Now, do you remember that testimony? A. Yes, I do.

XQ. Is it the fact that you did testify that it was Mr. Oreto who identified the man in the front seat? A. If I did, I meant Mr. DeChristoforo.

XQ. Is it a fact that you had testified under oath that it was Mr. Oreto who identified the man in the front seat as Johnny Simeone?

Mr. Irwin: I object, if your Honor please.

[407] The Court: That's the same question you put before. I think the witness ought to be allowed to answer it.

The Witness: If I did, I mean Mr. Oreto — excuse me, "Mr. DeChristoforo."

XQ. I'm going to ask you now to read to yourself, page 42, of that transcript, and see whether or not anywhere on that page there is any reference to a talk with Mr. DeChristoforo. A. The only conversation on that page 42 was that I had asked, in this book, — that I had asked Mr. DeChristoforo the name, and he gave a name.

XQ. You had asked Mr. DeChristoforo his name? A. Yes, sir.

XQ. And, he had given his name? A. He had given a name, not "DeChristoforo."

XQ. And, you say now that when Mr. Irwin asked you: Did you have any further conversation with Mr. Oreto, — after you testified that Oreto had told you that Oreto had told you that his name — Oreto's name — was

Johnny Rigo, — do you say that when Mr. Irwin asked you the question, "Did you have any further conversation with Mr. Oreto," and you [408] answered, "Yes, I did," and was then asked, "Would you tell us if you please what that was," and your answer, "I had asked Mr. Oreto and the man —"

Mr. Irwin: I object.

XQ. "... and the other man who the fellow was in the front seat," and then when you were asked, "Did Mr. Oreto answer that," and you answered, "he did," you were confused, you thought that he meant "DeChristoforo," is that it? A. Mr. DeChristoforo made the answer. If I said at the probable cause hearing or any other hearing in Malden, that Mr. Oreto said it, it was an inconsistent statement on my part. Mr. DeChristoforo said it.

XQ. So, that when you said in the District Court that it was Oreto who told you —

Mr. Irwin: I object.

The Court: Well, this is the third time you asked precisely the same question. I think the third time in the last four questions this same question has been asked. This is the last question, you are starting out, he already answered the question.

[409] XQ. Are you leaving it now that when you said that it was Mr. Oreto who told you that the man in the front seat's name was Johnny Simeone you were mistaken, and you meant that it was Mr. DeChristoforo; is that how you want to leave it?

Mr. Irwin: Objection.

The Court: Is your objection on the grounds of repetition, because this question has been asked three times already.

Mr. Irwin: Exactly; plus the fact, I suggest, that the officer answered, Mr. Oreto said that. The answer in the

transcript said he said that, with reference to conversation.

Mr. Smith: Well, then, if your Honor please, the question was, whether Oreto answered, identified the man, and he said he did.

The Court: Ask him the question: Did Oreto answer or did DeChristoforo answer? I thought he already answered the question. But, if you wish to ask the next question, you may.

XQ. Weren't you asked there: Did you have any further conversation with Mr. Oreto? And, you answered, [410] "Yes, I did." Weren't you asked that question? A. To the best of my recollection, yes.

XQ. And, you answered it that way. A. Yes.

XQ. Then weren't you asked: "Would you tell us if you would, please, what that was." And, your answer: "I had asked Mr. Oreto and the other man who the fellow was in the front seat." And, then the question put to you was: "Did Mr. Oreto answer that?" And, answer: "He did." Now, do you say that you didn't testify to that? A. I did testify to the statement, but, "He did" was Mr. DeChristoforo replying to this question.

XQ. But, you did testify, of course, that it was Oreto; isn't that so? A. Yes, sir.

XQ. Before you went into Court that morning, you had spent time with Mr. Irwin in preparing what your testimony was going to be, isn't that right? A. I don't recall.

XQ. Well, the only man that was under arrest was Oreto? A. That's right.

[411] XQ. And, it was a question of whether or not Oreto was going to be held for the murder charge; isn't that so? A. That's right.

XQ. So, that, at that time you were concerning yourself with what Oreto said, isn't that so? A. Yes, sir.

XQ. Now, I will hand you Exhibit B for identification, and ask you whether or not it is a fact that in the filing



of this handwritten report, in the drawing up of the handwritten report, you stated that: After Gagliardi got out of the car, and you had talked with him, that he told you that he was going across to his house—or words to that effect? A. That's right.

XQ. And, it is a fact that you stated in your report, is it not, that it was after that that you asked the two men in the car for identification? A. That's correct.

XQ. And, they said they had none. A. That's right.

. . .

[419] XQ. And, then you next wrote immediately following that statement: "We then examined the fourth man in the car." Is that right? A. That's correct.

XQ. And, prior to that statement there is nothing in your report that says that you had examined or looked at the man in the front seat of the car, is there? A. If it's not in the report—

XQ. Pardon me. I am simply asking you whether you have it in your handwritten report, prior to that? A. No, sir, I don't say that.

XQ. So, that the first reference you make to examining or looking at the man in the front seat was after DeChristoforo had left, and after you flashed the light in on the car and noticed the guns. A. On this report, yes.

XQ. Now, you testified here on direct examination, that it was after you examined the man in the front seat that you asked what was wrong, or words to that effect, and that DeChristoforo told you that he had been involved in a fight or something, or words to that effect; isn't that so?

[420] Mr. Irwin: Objection, if your Honor please.

The Court: What is your objection?

Mr. Irwin: The objection is that there is no such evidence.

XQ. Did you testify on direct examination here, that after you had seen the wounds on the man, or looked at him and saw that he had been wounded, that you then asked DeChristoforo as to what had happened, and that he told you that the man in the front seat had been involved in some fight in Revere? A. This is correct.

Mr. Irwin: I don't have any objection to that, that's a different question than the first one he asked.

The Court: What was the answer? I didn't get the answer.

The Witness: That's correct, yes, sir.

XQ. Now, of course, DeChristoforo couldn't have told you that if he wasn't there, that's so, isn't it? A. He was there.

[421] XQ. At least Oreto was there, wasn't he? A. And Mr. DeChristoforo.

XQ. At least Oreto was there?

Mr. Irwin: I object, if Your Honor please.

The Court: The testimony is that Oreto and DeChristoforo were there. That's what he said, not once, but twice. It goes without saying that at least Oreto was there.

Mr. Smith: All right.

XQ. Now, of course, you knew—you "know" as a police officer how long a second is, don't you? A. I have got an idea.

XQ. You have an idea. And you know how long a couple of seconds are? A. That is right.

XQ. How long do you say you talked to DeChristoforo while he was there? A. I guess a few seconds.

XQ. Well, do you recall testifying at some time previously that you talked to him for only a couple of seconds? A. No, I don't recall that.

. . .

[457]

GEORGE KATSAS, Sworn

*Direct Examination by Mr. Irwin:*

Q. Doctor, will you please be good enough to speak into the microphone and state your name, please. A. George Katsas, K-a-t-s-a-s.

Q. Your home address, sir? A. 130 Prince Street, Jamaica Plain.

Q. And, your occupation, sir? A. I am a physician.

Q. And, do you have a specialty as a physician? A. I am a pathologist.

Q. Where are you presently employed, sir: where do you presently practice your profession? A. I am an associate pathologist at the Waltham Hospital at Waltham.

Q. Tell us a little bit about your education and background? A. I graduated from the University of Athens in [458] Greece in 1947. I served my internship, residency in pathology in legal medicine at the University of Athens in Greece. From July 1953 to February 1966 I was associated with the Department of Legal Medicine at Harvard Medical School, and I was acting head of the Department for the last seven months of this period.

I am qualified by the American Board of Pathology for forensic pathology.

Q. And, you have testified in the Superior Court in Massachusetts in connection with pathology work that you have done in homicide cases? A. Many times, sir.

Q. Now, Doctor, would you tell us if you would, please, whether or not you had an occasion in your capacity as a pathologist to examine a body at the request of the Medical Examiner in the City of Medford on April 18, 1967? A. Yes, sir, I did.

Q. Would you tell us if you would, please, where it was in Medford that you first observed this body and at what time? A. First I arrived at the police station,

and in the [459] garage of the police station I observed the body in a car, beginning at approximately 5:30 a.m., on April 18, 1967.

Q. You observed a body in a garage at the Medford Police Station? A. That's correct.

Q. At approximately 5:30 a.m. A. That's correct.

Q. Would you tell us what observations you made about this particular body at that time? A. The body was in a sitting position in the front passenger seat. The rear window was approximately half way down, and through this window I felt the body which was warm, the skin was warm. I took pictures myself, and I was present when the State Police took pictures. I was waiting for the police chemist and then—

Q. Go ahead, tell us what observations you made. A. Then I removed the body from the car with the help of Captain Collins of the State Police Ballistics Bureau.

Q. At this point you took the body out of the car at the police station, is that correct? A. That's correct, sir. [460] Q. Now, I show you this picture which is Exhibit 5. Would you examine that photograph if you would please. A. Yes, sir.

Q. Would you tell us, sir, whether or not that fairly represents the position of the body in the car as you observed it that morning? A. Yes, sir, it does.

Q. Does that indicate the right rear window through which you felt the body to see whether it was warm or not? A. That's correct, sir.

Q. Was it from that door where the body is seated that you took the body out of the car? A. That's correct. Of course, we opened the other door, too, on the other side.

Q. When you took the body out of the car what did you do then, Doctor? A. We placed the body on a blanket next to the car. I felt the body again for temperature;

just by feeling the skin, it was warm. And, also I noticed that the body was limp, it was not rigid.

Q. Do you mean by the fact that it was limp rather than rigid that there was no evidence of [461] rigor mortis at that time? A. That's correct, sir.

Q. Now, would you tell us, if you would please, whether or not you were able to determine at this time that this person was in fact dead? A. The person was dead, sir.

Q. What else did you do at that time, Doctor? A. I took a few additional pictures, sir, just as the State Police photographer did of the body outside of the car. And, my recollection is that several officers and law enforcement officers who were waiting around looked at the body for possible recognition of the face.

Q. Was there anybody able to identify the body at that time? A. Not to my knowledge, sir.

Q. What if anything did you do then, Doctor Katsas? A. Then Doctor Guthrie, the Medical Examiner, ordered the removal of the body to the Gaffey Funeral Home where I proceeded.

Q. And, you then went to the Gaffey Funeral Home yourself? A. That's correct, sir.

[465] Q. Did you do that? A. Yes, I did.

Q. All right. Tell us what else you did. A. Well, during the autopsy, I make findings and make observations of the body. I found certain foreign bodies, which I removed from the body. I took tissues for both chemical examination and microscopic examination, and I concluded the autopsy.

Q. All right. Did you, in the course of your autopsy, remove some bullets from the body of Joseph Lanzi? A. Yes, sir, I did.

Q. Would you tell the jury where it was in the body of Joseph Lanzi that you recovered the bullets? A. One

bullet was recovered from the head of Mr. Lanzi, specifically from the region of the left eye. Three bullets were found in the soft tissues of the right side of the chest wall, close to the skin surface.

Q. So you recovered, all together, how many bullets?  
A. Four bullets, sir.

Q. All right. And would you tell us, if you would, please, with reference to the number of entrance wounds, so-called entrance wounds, with reference [466] to these bullets that you found in the body of Joseph Lanzi? A. One entrance wound was in the back of the head, just to the right of the midline, and two bullet wounds were very close together, almost side by side, on the left side of the chest, of the chest wall.

Q. All right. Did you observe another entrance wound there? A. There were three entrance wounds, sir.

Q. In the side? A. That is correct—two wounds on the chest and one on the back of the head.

Q. All right. But you recovered three bullets from what appeared to be these two entrance wounds? A. That is correct, sir.

Q. Now, did you observe anything about these wounds in the side here? A. Yes, sir.

Q. Would you please tell the jury what you observed about those, Dr. Katsas? A. About the wounds and about the hole in the clothing, in the overlying clothing, there was a deposit of smoke.

[467] Q. Would you tell the jury what that represents to you, sir, in your opinion? A. It represents that the gun was held very close or in contact with the body when the gun was fired.

Q. Would you tell us what injuries the deceased received as a result of these three wounds or these three bullets that entered through these two entrance wounds? A. The intestines were perforated. Also, the stomach, the dia-

phragm—which is a membrane and muscle which separates the chest from the abdomen—and also the lungs were perforated.

Q. Would you tell the jury, if you would, please, what injuries the deceased sustained as a result of the bullet wound to the head that you observed? A. The bullet wound of the head entered from the right back of the head and perforated the base of the brain until it lodged in the area of the left eye (indicating).

Q. All right. Now, with reference to these bullets that you recovered from the body of the deceased, Joseph Lanzi, what, if anything, did you do with those bullets? A. I handed the bullets to Mr. Cummings of the [468] State Police Firearms Identification Bureau.

Q. All right. And would you tell us, if you would, please, whether or not you obtained a specimen of the blood of the deceased, Joseph Lanzi? A. Yes, sir, I did.

Q. All right. And at some time during the course of your autopsy, did you deliver that specimen of blood to anybody? A. Yes, sir, I did.

Q. To whom, Doctor? A. To Mr. Talbot, Montgomery Talbot.

Q. The State Police chemist? A. That's correct, sir.

Q. All right. Now, Dr. Katsas, will you tell us, if you would, please, whether or not you conducted—strike that, please—whether or not you observed any other injuries on the body of Joseph Lanzi apart from the bullet wounds that you have already noted for the jury? A. There were no other recent injuries on the body.

Q. All right. A. There were a couple of scars—one on the abdomen and one on the left arm—but these were old.

Q. Were those old surgical scars? [469] A. One was a surgical scar on the abdomen. The other, I am unable to determine exactly whether it was a surgical scar or a wound which healed.

Q. But there were no other fresh wounds on the body?  
A. No other fresh wounds on the body, sir.

Q. And when you say, "old wounds", you mean of quite a time before this particular date? A. That is correct, sir.

Q. A matter of years, maybe? A. A matter of months or years.

Q. All right. Now, was there anything else significant in the pathology that you did on the body of Joseph Lanzi?  
A. No, sir.

Q. All right. And based, then, upon the autopsy that you performed and based upon the observations that you made when you first saw the body, do you have an opinion, sir, as to the cause of death of Joseph Lanzi? A. Yes, sir, I do.

Q. Would you tell the jury what your opinion is with reference to the cause of death of Joseph Lanzi? A. It is my opinion that Mr. Lanzi came to his death as a result of multiple gunshot wounds of the chest [470] and head with perforation of the brain, the liver, and the lungs.

Q. All right. Now, I draw your attention to—

The Court: Why not show all of those photographs at one time to your Brothers and let them look at them, if you intend to introduce them?

(Photographs shown to defense counsel.)

. . .

[473] Q. All right. And does this exhibit, which is now Exhibit 10, indicate the blood that you saw on the [474] T shirt of Joseph Lanzi near the wounds that you just described in his chest? A. Yes, sir, it indicates the blood and also the halo of smoke above the hole.

Q. The halo of smoke that you referred to in the clothing. Will you point that out to the jury, where the halo of smoke is in that particular picture? A. In the black and white it's difficult to differentiate the red from the black, but this round crescent-shaped area was black smoke. The



white spot is the hole in the clothing. All this smudge is blood. The blood can be seen from the top, as the picture is, on the top of the hole through the clothing.

Q. Dr. Katsas, in your opinion, the significance of the so-called ring of smoke is what? A. That the gun was held very close or in contact with the clothing and the body.

Q. All right. Now, Doctor, did you perform some tests, in addition to the observation that you made, to determine the time of death of the deceased, Joseph Lanzi? A. I made observations in order to determine the time of death.

[475] Q. What observations did you make in order to determine the time of death? A. I examined the body for the temperature of the skin. I took the rectal temperature. I took the liver temperature. I examined the body for rigor mortis, for lividity, and the internal organs, their appearance, during the autopsy.

Q. All right. Did you perform some tests, in addition to making those observations, for the purpose of determining the time of death of the deceased? A. No other tests.

Q. All right. Now, based on all of those things that you just enumerated, did you form an opinion as to the time that Joseph Lanzi met his death? A. Yes, sir, I did.

Q. Would you tell us, sir, if you would, please, what your opinion is? A. It is my opinion that Joseph Lanzi came to his death approximately four to six hours prior to the conclusion of my observations at about nine a.m. on April 18, 1967.

Q. So you concluded all your tests to determine this at approximately nine a.m. on the morning— A. I concluded all my observations.

[476] Q. All right. And if the time that you concluded that was nine a.m., you placed the time of his death somewhere between four and six hours earlier? A. That is correct, sir.

The Court: Would you reduce that, please, to a time?

The Witness: The only reduction I can do, Your Honor, is closer to four hours, rather than to six.

Q. All right. So by that, do you mean—if you say, “Between four and six hours before nine o’clock”, that would be between three and five in the morning, is that correct, Doctor? A. That is correct, sir.

Q. All right. So you place the time of his death between three and five o’clock in the morning? A. That is correct, sir.

Q. All right. Now, if you assume the fact, Doctor, that this man was seen dead by a police officer in a car at approximately four a.m. that morning, do you have an opinion, bearing that fact in mind, as to whether or not the time of his death was nearer to three or four a.m.? [477] A. My opinion is that the time of death was nearer to four a.m.

The Court: Is that all?

Mr. Irwin: I have just a few more questions, if your Honor pleases.

Q. Doctor, based upon the observations you made of that particular automobile and the body in the automobile before you removed it, and based upon the result of your autopsy, did you form an opinion as to whether or not this particular man, Joseph Lanzi, was shot to death in that automobile? A. Yes, sir, I did.

Q. And what is your opinion? A. It is my opinion that Joseph Lanzi was shot in that automobile.

Q. In that automobile? A. That’s correct, sir.

Q. All right. Do you have an opinion as to whether or not Joseph Lanzi was alive or dead when all of these wounds were inflicted on his body? By that, I mean: the total of the four bullets? A. There is evidence indicating that he was alive when all the shots were fired.

Mr. Balliro: I ask that that answer be [478] stricken.

The Court: What are the grounds for that?

Mr. Balliro: He was asked if he had an opinion. It is not a responsive answer.

The Court: All right.

Mr. Irwin: Yes.

Q. Do you have an opinion whether or not, bearing in mind that there were four bullet wounds, whether or not all of these wounds were inflicted while Joseph Lanzi was alive? A. Yes, sir, I do.

Q. What is your opinion? A. It is my opinion that all wounds were inflicted while Joseph Lanzi was alive.

Q. All right. Would you tell us, if you would, please, whether or not you have an opinion as to whether or not the wound in the head would, in and of itself, be fatal to Joseph Lanzi? A. Yes, sir, it would.

Q. All right. And would the wounds in the chest of Joseph Lanzi, independent of the head wound, in and of themselves, be the cause of the death of Joseph [479] Lanzi? A. Yes, sir, they could.

Mr. Irwin: I have no other questions.

The Court: You may cross-examine.

Mr. Smith: Yes.

*Cross-Examination by Mr. Smith*

XQ. Doctor, other than measuring the height of Lanzi, did you take any other measurements? A. I estimated the weight and I took measurements of the injuries, of the wounds.

XQ. All right. You say his height was what? Five foot nine? A. Sixty-nine inches, sir.

XQ. Yes, five nine? A. That is correct, sir.

XQ. He weighed about 170 pounds? A. That was my estimate, sir.

XQ. Now, did you take any measurements of the circumference of his chest? A. No, sir, I did not.

XQ. Or the circumference or the width of his shoulders? A. No, sir, I did not.

XQ. Or the circumference of his hips? [480] A. No, sir, I did not.

XQ. Could you, Doctor, give us your best estimate of what the circumference of his chest was? A. I don't know, sir. I didn't measure it.

XQ. So that you can't give us an opinion about that? A. No, I can't.

XQ. Well, Doctor, with respect to the head wound, will you face the Court, if you will, and point with your finger, so that the jury can see, approximately where the entrance wound was? A. The entrance wound was approximately in this place (pointing).

XQ. Would you turn around? A. (Witness complied.)

XQ. I see. So that it was somewhat to the left of the right ear, of the right ear lobe? A. That is correct, sir.

XQ. And can you describe the bullet tract of that wound, Doctor? A. The bullet went forward and to the left.

XQ. Forward and to the left? A. And to the left in relation to the head, so that it came to the left region of the left eye.

\* \* \*

[482] XQ. Well, even assuming it was turned to the left, it still would have had to come from the right-hand side of the deceased, wouldn't it? A. The only thing I know, is the path of the bullet in the brain. The head can move; the gun can move. The only thing I know is that the bullet comes from the right part of the head to the left eye. It could have been directed from the right side of the decedent, or the head of the decedent might have been turned.

XQ. Now, Doctor, assuming that the decedent was sitting in an upright position in an automobile and is facing forward, assuming that, and he is shot, resulting in a bullet tract such as you describe, and that following that, he is found with his head tilted to the left, would you say,

Doctor, that that would indicate to you that the gun was held from the right side of the decedent's head? A. Assuming that the head, that the decedent was facing forward, the gun should have been held to the right of the side of the head. The tilting of the head [483] after he collapsed does not mean anything.

\* \* \*

[486] XQ. I know you don't know it, Doctor, but I'm asking you whether or not it would be inconsistent. Would the arm have had to be raised in order to have those type of entrance wounds? A. Either raised or forward, placed forward or backwards, I do not know.

XQ. So, that, Doctor, if the arm were up on the back rest, on the back of the front seat, such wounds as you describe — strike that.

XQ. So, that such wounds as you describe could have been occasioned if the arm were up on the back of the front seat of the car? A. Yes, sir, they would.

XQ. And, do you have an opinion as to whether the body was moved after the shooting? A. Yes, sir, I do have an opinion.

XQ. What is your opinion? A. That the body was not moved.

Mr. Smith: Thank you, Doctor.

\* \* \*

[504] The Court: Having heard the voir dire, having heard the testimony of the officer yesterday, and having heard the complete and rather extensive cross-examination with regard to the transcript of the record in the probable cause hearing conducted by Mr. Smith, I find that there is no reason for me to allow the inspection of the Grand Jury minutes.

Mr. Smith: My exception.

Mr. Balliro: My exception.

Mr. Smith: May I for the record point out what the inconsistent statements are?

The Court: You may for the record, but I don't think it is necessary to point them out at this moment. You may if you wish. Your rights have been saved in this matter. I have heard all the testimony that you have heard.

Mr. Smith: Except that Your Honor hasn't had an opportunity to examine his testimony at the probable cause hearing.

[505] The Court: Yes, I have.

Mr. Smith: The complete testimony?

The Court: Not beginning with the name and ending with the last question. I have examined that part of the testimony which concerns itself with what I think you are concerned with, and that is that part of the testimony as to whether or not DeChristoforo was present or absent and whether or not he directed his remark or remarks to —

Mr. Smith: This is precisely the issue.

If Your Honor please, there are these major inconsistent statements. He has testified —

The Court: Isn't this more appropriately discussed in the exception rather than here, because I have already ruled on it and I have heard the testimony of the officer and I have examined the material parts of his testimony. I have read the material part of his testimony about which you are speaking, his testimony in the probable cause hearing, and I see no reason in the light of all that to allow you to view the Grand Jury minutes. I see nothing about this case that makes it unique in that respect; [506] so I again am denying it and saving your rights.

Mr. Smith: Except may I point out this: I think what is unique about this case is: This is a capital case, I am convinced, and I say to Your Honor that the testimony of

Officer Carr, and if daily conforms to the same testimony, is in my judgment the only evidence of any significance that might result in a conviction of this defendant. This is a capital case and I believe that I should be afforded every possible means of establishing that this officer's testimony is not credible. I therefore urge upon Your Honor to reconsider this question. I say it's an unusual case, this is not the ordinary run of the mill criminal case, this involves a man's life.

The Court: Motion is denied and your rights are saved.

Mr. Smith: Exception.

Mr. Balliro: Exception.

EXCEPTIONS 58 & 59

The Court: And insofar as you have joined in the motion, your motion is denied and your rights are saved. [507] Mr. Balliro: I would move that Your Honor make an in camera inspection of the Grand Jury minutes of the testimony of the witness, Carr, for the purpose of determining whether or not there is inconsistency that ought to be brought to the attention of the jury.

The Court: No.

Mr. Balliro: My exception.

Mr. Smith: I join in that and my exception.

EXCEPTIONS 60 & 61

The Court: Your rights are saved.

The Court: We will now turn to another matter which concerns itself with the testimony of Officer Carr and the problems we had yesterday, and I ask the District Attorney and you to confer on the questioning of Officer Carr in these two regards to allow me sometime to educate myself to the present status of the law.

My work overnight has made me determine the following: one, Mr. Smith, if he wishes may offer the handwritten statement of Officer Carr in its entirety and then

can be read to the jury. The District Attorney may not offer it if he declines to offer it.

. . .

[530]

JOHN P. BRADY, Sworn

*Direct Examination by Mr. Irwin*

Q. Sir, would you speak into the microphone, please, and give us your name and your home address, please?  
A. John P. Brady, 106 Taft Street in Medford.

Q. And your occupation, sir? A. I am a police officer in the City of Medford.

Q. How long have you been employed in that capacity, Officer Brady? A. Approximately three and a half years.

Q. Directing your attention back to the day that the jury is concerned with and we are concerned with here, April 18, 1967. Were you on duty that particular morning?  
A. Yes, sir, I was.

Q. Would you tell the jury, please, what time it was that you went to work that day? A. 12:15 a.m.

Q. And your assignment was what? A. I was assigned to a cruiser car as the observer.

Q. Who was driving that particular car? A. Officer Pat Carr.

[531] Q. Now sometime on that particular morning, in your capacity as observer in a sector car, were you on Middlesex Avenue and Highland Avenue, in the City of Malden and Middlesex Avenue in the City of Medford at sometime that morning? A. Yes, I was.

Q. Would you tell the jury, Officer Brady, what time it was if you would please? A. It was 3:55 a.m.

Q. Where were you located at 3:55 a.m.? A. Near the corner of Highland Avenue and Medford Street in Malden.

Q. Would you take a look please behind you at Exhibit 1, that particular map, and familiarize yourself with it for a moment. Are you oriented to that map now, do you



understand the areas that are represented? A. Yes, sir.

Q. Would you point out to the jury, Officer, where you were in that cruiser at about 3:55 a.m.? A. Approximately right here, at the corner of Highland Avenue and Medford Street.

[532] Q. In what city? A. That is in the City of Malden.

Q. Where were you going at that time? A. We were headed back onto our sector up in here in Medford.

Q. Having come from what direction? A. Having come from this direction here, down Middlesex Avenue onto Highland Avenue.

Q. Now would you tell the jury if you would please whether or not at Highland Avenue and Medford Street there are any traffic controls, or there were on April 18, 1967? A. Yes, there are a set of traffic lights here, and also a stop sign.

Q. Would you tell the jury if you would please, whether or not you went onto Medford Street at approximately that time? A. Yes, we did.

Q. You took a left? A. Took a left off Highland Avenue onto Medford Street.

Q. As you started down Medford Street, would you tell the jury, if you would please, whether or not you observed anything? [533] A. Yes. As we made the turn here I observed a 1967 Ford, reddish maroon color, with four men in it. Just after we made the turn onto Medford Street.

Q. Would you tell us what you observed? A. I observed the red Ford with the four men in it. And I also observed the number plate of this car.

Q. Did you make a notation as to the number plate of that car? A. Yes, I did.

Q. What did you do it on, sir? A. On a police manifold report.

Q. At what point did you write down the number of the

car, Officer? A. As we passed the car, I wrote it down.

Q. Is it safe to say that this car was going toward Highland Avenue and you were going away from it?

A. That's right.

Q. As you passed the car you observed four men in it, is that correct? A. That is right.

Q. And you observed the number plate of the car?

A. That's right.

Q. You noted the number plate? [534] A. Yes, I did.

Q. Thereafter did you make any other observations of that car? A. Yes.

Q. What was that? A. I looked to the rear of the cruiser as we were going down Medford Street, and I observed the Ford going through the red light at the corner around onto Highland Avenue. At this time my partner turned the cruiser around and we headed in the same direction in which the Ford had gone.

Q. Did you observe whether or not there was a traffic control in operation at that time at the intersection?

A. Yes, I did.

Q. Was there? A. Yes, there was.

Q. What type of a control was it? A. A blinking red light.

Q. Did you observe whether or not this car made a stop at that red light? A. No, it did not, it went right through.

Q. Now were you able to determine that there were [535] four men in the car? A. That is right.

Q. Could you tell the jury whether or not at that time you were able to identify or describe any of these men?

A. No, I was not.

Q. Could you tell us anything about the seating arrangement of these four men in the car at that time?

A. Yes. There were two men in the front and two men in the rear.

Q. Now this was at what time of the morning? A. 3:55 a.m.

Q. What was the weather like? A. It was pouring rain.

Q. Was there any other traffic on the street? A. None at all.

Q. So I understand now that having made these observations, the cruiser was turned around by the driver, Patrick Carr, and headed back in the direction of Highland Avenue? A. That's right.

Q. Did you take a right on Highland Avenue? A. Yes, we did.

[536] Q. And at this time were you able to observe that car that you had seen go through that intersection? A. I was only able to observe the taillights of the vehicle. They were up in here where the bend in the road would be.

Q. And there had been no intervening traffic? A. No.

Q. So you were satisfied that those taillights were the car that you had seen? A. That's right.

Q. How long would you say it took you, Officer Brady, to turn that cruiser around and to go back after this car? A. I say a matter of a few seconds, that's about all.

Q. And did your automobile then, once you got back to the Highland Avenue intersection and turned right, did you accelerate the car, or did Officer Carr? A. Yes, Officer Carr did.

Q. At a high rate of speed? A. Yes.

Q. How fast would you say you were going? A. I say approximately 60 miles an hour or so.

Q. At some point you got down to the neighborhood [537] of Third and Fourth, and Fifth Street in through there? A. Yes.

Q. Back in the City of Medford, is that correct? A. Yes, sir.

Q. Would you tell the jury now, Officer Brady, what observations, if any, you made, at that point. A. At this

time we were traveling on Highland Avenue, and as I said, we could see the taillights of the car just going around the corner. My partner accelerated the cruiser to approximately this point here, where he observed —

Mr. Smith: Well —

A. — tire marks in the road.

Q. Did you observe them? A. Yes, I did.

Q. You observed tire marks? A. Yes.

Q. What did you do then? In what direction did the car go? A. The car then went down — the 1967 Ford then went down Third Street.

Q. Did you see it go down Third Street? A. No. I saw it on Third Street. But I did not [538] see it make the corner on Third Street.

Q. You did not see it make the corner on Third Street? A. No.

Q. Did you go down Third Street or go by it? A. We went by onto Fourth Street.

Q. When you got by onto Fourth, what did you observe? A. I observed the '67 Ford pass us — pass in front of us on Cradock Avenue, which is this street here.

Q. What did you observe about the car at that time, Officer Brady? A. There were no headlights on the car.

Q. With respect to the cruiser that you were in, was that cruiser lighted at that time? A. No, and my partner had shut the lights off as we made the corner onto Fourth Street.

Q. Now after observing this '67 Ford go by the end of Fourth Street on Cradock Avenue, what did you do then? A. We continued on down Fourth Street to Cradock Avenue. Once on Cradock Avenue, we took a right onto Fifth Street.

Q. Would you tell the jury, if you would please, now what happened when you took a right onto [539] Fifth Street? A. As we made the corner I observed the same

car parked in front of No. 6 Fifth Street. My partner then pulled the cruiser alongside and a little ahead of this car, and we both got out.

Q. Officer Brady, when you got out of the car what was the weather like at that time? A. Pouring rain.

Q. You got out the passenger side on the right front of the car, is that correct? A. That is correct.

Q. Officer Carr got out of the driver's side? A. Right.

Q. At the time that you both got out of the car did you observe anybody there then? A. Yes, I did.

Q. Who? A. Carmen Gagliardi.

Q. Did you see Carmen get out of that Ford? A. Yes, I did.

Q. What door did he get out? A. He got out the driver's door.

Q. Now at this time was Carmen Gagliardi known to you, Officer Brady? [540] A. Yes, he was.

Q. You knew him by name? A. Yes.

Q. After you observed him get out of the car, was there anybody else that got out of the car, the Ford, that is, at that point? A. No, there was not.

Q. Now at that time was there some conversation that was had in your presence between Officer Carr and Carmen Gagliardi? A. Yes, there was.

Q. Do you recall what that conversation was? A. Yes, I do.

Q. Would you tell the jury, if you would please, what that conversation was that you heard Officer Carr have at that point with Carmen Gagliardi? A. My partner asked Carmen what was going on. And he said, "Nothing, I am just going in the house for a minute." My partner then asked who the car belonged to. He said it was his, that it was a rental.

Q. Did you observe how Carmen Gagliardi was dressed at this time? A. Yes, I did.

[541] Q. Would you tell the jury what your memory is as to how he was dressed at that time? A. He had a rain and shine trenchcoat type thing. And he had his hands in his pockets of the coat.

Q. Did you observe what, if anything, Carmen Gagliardi did after he had that conversation with Officer Carr? A. Yes. He backed away from us toward No. 9 Fifth Street; went to the front door, where I believed he lived, opened the door as if to go in. Then my attention was drawn back to the vehicle.

Q. John, when you say that he backed away from you, can you describe what you mean by that? A. Walking backwards with his hands in his pockets.

Q. So he walked across the street backwards with his hands in his pockets? A. Right.

Q. And at that time you were aware that he lived on Fifth Street, is that correct? A. That's correct.

Q. But you didn't know what house or what number? A. That's right.

Q. Having seen Mr. Gagliardi do that, can you tell us, Officer Brady, what you did next? [542] A. My attention was drawn back to the car, and I walked to the rear of this red Ford.

Q. You walked to the rear of the parked car? A. Yes.

Q. Did you observe what Officer Carr did at this time? A. Yes, Officer Carr went back to the cruiser and took out a light, a wheat lamp, we call it.

Q. At that point you were standing near the back of the car? A. That's right, at the back of the car.

Q. Is this police procedure? A. Yes.

Q. So that one of you stands to the rear of the car when another is toward the front of the car, is that right? A. That's right.

Q. So that you have the car under your observation, is that it, and it's occupants? A. Right.

Q. Now, when you got the lamp, when Officer Carr got the lamp, what happened next, what did you observe next?

A. He walked to the right hand side of the car. [543] This would be the street side of the car.

Q. By the car you mean the Ford? A. The Ford, that's correct, the red Ford. And he went to the rear door of the car where the window was partially open, and he asked the two men in the back of the car to step out.

Q. How far away were you standing from them when they stepped out? A. Between four and six feet, I would say. When they left the car, from the rear of the car door to the rear fender of the car.

Q. As close as we are? A. Closer.

Q. Approximately at this distance? A. Approximately that distance, yes.

Q. You were at the rear of the car, so that as these people stepped out, is it safe to say they came out this way, is that right? A. Pardon me?

Q. Is it safe to say that they came out this way? A. That's right.

Q. With their back toward you? A. Yes.

[544] Q. Did the two of them come out into the street?

A. Yes, they did.

Q. Did you observe whether or not they both came out the same door? A. Yes, they did.

Q. And did you then put yourself in a position where you could look at these particular men? A. Yes, I did.

Q. How did you do that? A. I moved to the right which would be further out in the street.

Q. You moved at an angle to the right so that you could observe who they were? A. Yes.

Q. The two men are now standing on the street? A. That's right.

Q. Now, do you know which man it was, based on these sequence of events, that was the first one that came

out of the back seat? A. Yes, I do. That was Frank Oreto.

Q. Who was it that followed him out of the back seat?  
A. Butch DeChristoforo.

[545] Q. Did you know him at that time as Butch DeChristoforo? A. No, I did not.

Q. Did you know his name at all? A. No, I did not.

Q. Now when these two men got out of the back seat, at this point was there some conversation that you recall, if you do recall any? A. Yes.

Q. Was there? A. Yes.

Q. Did you have any conversation with them? A. No, I did not.

Q. Officer Carr did? A. Yes.

Q. Incidentally, at this time, Officer Brady, you hadn't been a police officer very long, is that right? A. No, I had not.

Q. So you were what, a junior man with reference to Officer Carr? A. That's correct.

Q. So he did the questioning? A. Right.

[546] Q. At this particular time, would you tell the jury what conversation you recall that Officer Carr had with the men that you identified as Oreto and DeChristoforo?

A. Yes, sir. He asked both men if they had any identification.

Q. Did you hear whether or not either one of those men made an answer to that or both of them? A. They both answered they had none.

Q. They both said no, is that correct? A. That's correct.

Q. Or, they had none. A. They had none.

Q. Tell us what happened then or what you observed after that. A. Patrolman Carr asked them what their names were.

Q. And do you recall whether or not either one of



those men answered when he asked what their names were?

A. Yes, I do.

Q. Who answered? A. Mr. Oreto answered and said his name was Joseph Rego, and that he was from Boston.

[547] Q. Did you hear whether or not Mr. DeChristoforo answered that question? A. Yes.

Q. Did you hear what he said? A. He gave us a name, but I don't know what it was.

Q. You don't recall what that name was? A. No.

Q. Was it "DeChristoforo" to your best memory? A. No, not "DeChristoforo."

Q. Incidentally, Officer Brady, that man that you told the jury just a moment ago was Butch DeChristoforo, is he seated in this courtroom? A. Yes, sir. He is.

Q. Can you indicate where he is seated, to the jury? A. Yes, he is the one on my right in the dock.

Q. And, that is the man that you heard answer Officer Carr's replies together with Mr. Oreto, is that correct? A. That's correct.

Mr. Irwin: May the record indicate that the witness did identify the defendant, DeChristoforo, in the courtroom.

Q. Now, Officer Brady, after that conversation where they gave their names, or what they purported to [548] be their names, tell us what you remember happened next?

A. My partner asked who the man in the front seat was and what was wrong with him.

Q. Did somebody make an answer to that? A. Yes. Mr. DeChristoforo said his name was Johnny Simone, and that he had been in a fight in a joint in Revere, and that he would be all right, they were going to take him to the hospital.

Q. Now, up until this point, had you looked at the man in the front seat? A. Only from what I could see from where I was standing.

Q. And you said that at one point Officer Carr, before any conversation with these people, had taken a wheat lamp and walked past the front of that car, is that correct? A. That's correct.

Q. Now, after DeChristoforo said the name was Johnny Simone and he was in a fight over in Revere and he would be all right, did Mr. DeChristoforo at that point say anything else? A. Yes, he did.

Q. What did he say? A. He said he wanted to go over to Carmen's house.

[549] Q. And, did you observe what he did then? A. Yes. He walked in the same direction in which Carmen had gone, to Number 9 Fifth Street.

Q. Now, did you make any observations as to what these two men, Oreto and DeChristoforo, were wearing that particular morning? A. Yes.

Q. Could you tell us as best your recollection is as to what they were wearing that morning? A. Yes. Mr. Oreto had a — I believe one of these new Army type raincoats, very light-weight plastic type, and Mr. DeChristoforo also had a trenchcoat type of raincoat on.

Q. As you stood in the street there was it raining? A. It was pouring, yes.

Q. Very heavy rain? A. Very heavy.

Q. Were they wearing hats at the time? A. No, they were not.

Q. Would you tell us what else you observed that these men were wearing, if anything? A. I observed Mr. Oreto had a pair of black, what appeared to me was kidskin gloves such as a woman [550] would wear. They had a V-shaped cut in the back of the hand.

Q. Did you observe, or were you able to observe whether or not Mr. DeChristoforo had anything on his hands, if you recall? A. No, I don't recall that Mr. DeChristoforo had anything on his hands.

Q. You made no observation of that? A. No, I did not.

Q. Do you recall whether or not he had his hands in his pockets or not? A. No, I don't.

Q. You don't remember? A. No.

Q. Incidentally, how much time elapsed in the sequence of events that you just testified to when you stopped the cruiser beside this car; how much time would you judge?

A. It was very fast; everything happened very fast: I say a matter of two or three minutes at the tops.

Q. When Mr. DeChristoforo said he wanted to go get Carmen, did you observe him walk away in a particular direction? [551] A. Yes, sir, I did.

Q. You made no effort to stop him at that point? A. No.

Q. And, did you see where he went, Officer Brady? A. Yes.

Q. Where did he go, in what direction? A. He also went towards No. 9 Fifth Street.

Q. And, after you saw him go in that direction, what did you do then? A. I, myself, and my partner, and Mr. Oreto walked around to the other side of this red Ford.

Q. You walked around the other side of the red Ford. As I understand it, so the jury can understand: These conversations that you just told us about took place out in the street? A. Yes.

Q. Which would be to the right of the parked Ford, is that right? A. That's right.

Q. And, to the rear of the Medford Police cruiser? A. Yes, sir.

Q. Now, you say that after DeChristoforo walked off in the direction of No. 9 Fifth Street, you then [552] directed your attention back to Mr. Oreto? A. That's correct.

Q. And, did you walk some place with Mr. Oreto? A. Yes, I walked around to the front of the red Ford and around onto the sidewalk.

Q. Up onto the sidewalk? A. Onto the sidewalk.

Q. In front of what number? A. That would be No. 6 Fifth Street.

Q. Did Officer Carr come around there with you? A. Yes, he did. He was in front of myself and Mr. Oreto.

Q. And, at this time was Mr. Oreto saying anything to you? A. No, he was not.

Q. And, would you tell us that happened when you got around to the other side of the Ford? A. My partner shined the light through the rear window of the car, and opened the door, and pulled out two guns. And, he asked Mr. Oreto if these were his guns —

Mr. Balliro: I object, if your Honor please to the conversation.

[553] The Court: He may have it.

Mr. Balliro: Exception.

EXCEPTION No. 71

Q. Did he say something to Oreto about these guns? A. He asked Mr. Oreto if they were his guns.

Q. Did Oreto make any answer to that? A. He said, "No."

Q. Where were you standing at this time? A. I was closer, I would say, to the bushes on the sidewalk, between the bushes and the car on the sidewalk.

Q. There are bushes in front of No. 6 Fifth Street, is that correct? A. Yes.

Q. Tell us if you would please, whether there was any other conversation at that point about these guns. A. Not that I can remember, no.

Q. Did you observe what Officer Carr did with those guns? A. Yes, he took them and put them on the front seat of our cruiser.

Q. At this time were you still standing there with [554] Mr. Oreto? A. Yes, I was.

Q. What happened when Officer Carr came back, if he

did come back? A. Officer Carr came back and opened up the driver's door of the red Ford, and reached in and checked Mr. Lanzi's body to see if the man was still alive or dead.

Q. Did you observe what he did, John? A. Yes, I did.

Q. What did he do? A. He put his hand into the coat of the man that was in the car to feel and see if he had any heartbeat.

Q. And, did you observe him take his hand away? A. Yes.

Q. What happened after Officer Carr did that? A. He got back out of the car and asked me to go in and check the man in the front seat.

Q. Did you do that, Officer Brady? A. Yes, I did.

Q. Would you tell the jury what you did? A. I also did the same thing: I put my hand into [555] his clothing, and I also felt the pulse to see if I could get a pulse in the wrist, which I couldn't.

Q. And, at that point were you satisfied that he was dead? A. Yes.

Q. What happened after that, after you did that? A. I stepped back out of the car, told Mr. Oreto to turn around and put his hands on the roof of the car and I searched him, and put handcuffs on him.

\* \* \*

[558] (Mr. Montgomery Talbot entered the courtroom.)

Q. Did you find any of the men that you saw that night? A. No, we did not.

Mr. Irwin: If Your Honor please, with the permission of the Court, I would like the chemist to turn over to me a pair of gloves that he has in his possession right now; and inasmuch as he is a witness, I would then ask the Court to excuse him from the courtroom.

The Court: All right.

(Mr. Talbot handed an object to Mr. Irwin and then withdrew from the courtroom.)

Q. Now, Officer Brady, are those the gloves that you saw Frank Oreto wearing that night? A. Yes, they are.

Q. And are those the gloves that, to your present knowledge, were recovered by Officer Walsh in front of 6 Fifth Street that day? A. Yes.

Q. And turned over to the State Police chemist? A. That's correct.

Q. All right.

Mr. Irwin: If Your Honor please, I am going to offer it.

\* \* \*

[565] *Cross-Examination by Mr. Smith:*

\* \* \*

[566] XQ. He didn't have his hands in his pockets when he came out of the rear of the car, did he? A. I don't think so, no.

XQ. So you had an opportunity to see his hands? A. I don't recall.

XQ. Well, in any event, you don't suggest that he might have been wearing gloves, do you? A. No, I don't.

XQ. Where did you get the name of Butch DeChristoforo? A. Where did I get the name? Is that what you said?

XQ. Yes. A. Somewhere along the investigation of this case.

XQ. You learned, didn't you, that that was a nickname he was known as since he was a baby, isn't that right?

Mr. Irwin: I object, if Your Honor please.

The Court: Excluded.

Mr. Smith: Exception.

EXCEPTION No. 72

XQ. Well, you learned that he was known by his family and friends as Butch DeChristoforo, isn't that right?

Mr. Irwin: I object on the same ground.

\* \* \*

[588] *Redirect Examination by Mr. Irwin:*

Q. Officer, at any time that night did Mr. DeChristoforo ever tell you that his name was "Butch?" Do you have a memory of that? A. No.

Mr. Smith: I object. I don't mind the last part of it. I object to the question.

The Court: No.

Then I take it that's all, Officer, you may step down.

Is that all?

Mr. Irwin: Yes, your Honor.

(Witness excused.)

The Court: The jury may have their lunch. I hope it's all arranged in the jury room, and go for the walk as you suggested; and those of you who don't want to go for a walk, perhaps the Officer will arrange to have somebody stay with the jurors.

Unfortunately, you either have to go for the walk in toto or not go at all, because we don't have that many officers.

Recess until two o'clock.

(Court recessed at 12:30 p.m.)

\* \* \*

[589] *WILLIAM MODUGNO, Sworn*

*Direct Examination by Mr. Irwin:*

Q. Speak into the microphone and identify yourself, please. A. William Modugno.

Q. Would you spell your last name? A. M-o-d-u-g-n-o.

Q. Where do you live, sir? A. 9 Fourth Street, Medford.

Q. And your occupation, sir? A. Electronic engineer.

Q. By whom are you employed? A. Itek Corporation.

[590] Q. All right. Sir, how long have you been living at 9 Fourth Street? A. Twenty-five years.

Q. All right. Now, directing your attention back to July, 1967, specifically July 25, 1967, were you living at 9 Fourth Street on that day? A. Yes.

Q. All right. Is that a 2-family house or — A. Yes, it is.

Q. All right. And does some other member of your family live there with — A. My brother. He lives upstairs.

Q. Directing your attention to this day, the 25th day of July, 1967, did you have an occasion to be in the back yard of your house? A. Yes.

Q. That particular day? A. Yes.

Q. Do you recall what time in the day it was, Mr. Modugno? A. It was late afternoon, after five o'clock.

Q. All right. And will you tell us what you were doing in the back yard? A. I was putting up a grape arbor. The old one fell [591] down so I was putting up a new one.

Q. All right. You were putting up a new grape arbor? A. Arbor.

Q. All right. And pursuant to that effort, were you doing some digging? A. Yes. I was starting to dig a hole for the post.

Q. And at some time, Mr. Modugno, while you were digging, did you find something? A. Yes. First shovel I turned over, the gun fell out.

Q. You found a gun? A. Yes.

Q. And what, if anything, did you do with the gun when you found it? A. Well, first thing, I went down the cellar and washed it.



Q. You picked it up? A. Picked it up.

Q. Would you describe to the jury what it looked like when you picked it up? A. It was caked from the mud.

Q. Caked full of mud? A. Yes.

The Court: What day was this now?

Mr. Irwin: July 25, if Your Honor please, [592] 1967.

Q. Now, you took it down the cellar? A. Yes.

Q. And you did something with it down there, sir?  
A. Yes. I washed it.

Q. You washed it? A. I wasn't sure it was a real gun or not.

Q. What? A. I wasn't sure whether it was real or not.

Q. So you washed it? A. Yes.

Q. And at this time did you make a determination that it was a real gun? A. Yes, after I took some of the mud off.

Q. All right. And what did you do with it then, sir, after you made that determination? A. I wrapped it in cloth and I called the police station.

Q. You called the Medford Police. All right. And did somebody from the Medford Police come down to your house? A. Yes.

Q. Do you know who it was? A. Officer Sacco.

[593] Q. Do you know Leo Sacco, of the Medford Police?  
A. No, I don't know him personally.

Q. You know him as a result of seeing him that day?  
A. Yes.

Q. Is he the officer that came? A. Yes.

Q. Now, at this time did you indicate to him where you had found this particular weapon? A. Yes. I showed him the spot.

Q. All right. And did you also turn the weapon over to him in this cloth? A. Yes.

Q. I show you these —

Mr. Irwin: Excuse me. I am sorry.

(Photographs shown to defense counsel.)

Q. I show you these three photographs, Mr. Modugno, and ask you whether or not those are fair representations of certain areas of your back yard and your premises at 9 Fourth Street? A. Yes.

Mr. Irwin: If Your Honor please, I would like to offer these three photographs.

(Photographs shown to the Court.)

The Court: All right. They may be marked.

[594] (Three photographs marked Exhibits 15, 16, and 17, respectively, and received in evidence.)

Q. I show you, Mr. Modugno, this photograph which is now marked Exhibit 16. Would you take that photograph, sir, and, if you would, please, point out to the jury — in separate sections — first this half of the jury, where it was that you found that gun? A. Here (pointing).

Q. And does this photograph, Exhibit 17, does that indicate a closeup of that particular area that you pointed out, where you found that gun? A. Yes, it does.

Q. All right. Drawing your attention to this photograph which is marked Exhibit 15, would you tell the jury, if you would, please, whether or not this is the side of your house or the extension of the driveway that comes in from Fourth Street? A. Yes. The driveway is over here. This is just a piece of land.

Q. Now, is that driveway, or: in 1967, in April of 1967, was that driveway there then? A. Yes.

Q. All right. And is there a fence to close off that [595] driveway up there? A. Yes. When you come in from the street, there is a gate.

Q. Did you ordinarily leave that open? A. Yes.

Q. Because you had a car parked there? A. Right.

Q. And, to the best of your knowledge, on April, in April of 1967, would that have been left open for the purpose of parking vehicles there? A. I do not know.

Q. You don't know? A. No.

Q. Okay. Now, directing your attention back here to this house which is in the photograph here, can you see that house that I am pointing to? A. Yes.

Q. And it's on Exhibit 15. It is what appears to be a three-decker house to the right of 9 Fourth Street. Can you tell us where that house is located, sir? A. Fifth Street.

Q. So your house is on a direct line behind that house on Fifth Street? A. Yes.

\* \* \*

[614]

WALTER DELLO RUSSO, Sworn

*Direct Examination by Mr. Irwin:*

Q. Sir, will you speak into the microphone, please, and give us your name and your home address. A. My name is Walter Dello Russo, 64 Prince Street, Boston, Mass.

Q. And, would you spell your last name for the record, please. A. D-e-l-l-o R-u-s-s-o.

Q. Are you married or single, sir? A. Married.

Q. Your occupation? A. I am not working right now.

Q. When you are working, sir, what is your occupation? A. Bartender.

[615] Q. Mr. Dello Russo, directing your attention back to April 17, 1967, were you employed at that time as a bartender any place? A. Yes.

Q. Tell the jury, please, where? A. I was working at the Attie Lounge that night.

Q. Where is that located? A. I don't know the address, I forgot it. It's on Stuart Street.

Q. Stuart Street in Boston? A. Right.

Q. How long had you been working there on April 17, 1967? A. How long?

Q. For how long a period of time had you been there up until April 17th? A. I was working down at the Four

Corners Lounge and once in a while they would send me upstairs.

Q. Do I understand from that, that the Attic Lounge was up over the Four Corners Lounge? A. Right.

Q. So, this was one bar on top of another, is that [616] correct? A. Right.

Q. And, you used to operate between the Four Corners Lounge and the Attic Lounge? A. Right.

Q. How long had you been there in both of those places as a bartender? A. About six months to a year, somewhere around there.

Q. When you were working in the Four Corners Lounge who employed you there, do you know? A. I was employed by, I think it was Butch DeChristoforo employed me; and I was working at the Attic first, then I went downstairs.

Q. Well, what was this Butch DeChristoforo that you speak of; what was his capacity there? A. He was the manager in the Attic.

Q. He was the manager in the Attic Lounge? A. Right.

Q. Is he here in the courtroom, Mr. Dello Russo? A. Yes.

Q. Would you indicate to the jury and to his Honor where he is seated? [617] A. Right there, on the right.

Q. On the right as you look at those two men? A. Right.

Mr. Irwin: Will the record indicate, please, your Honor, that he indicated the defendant, DeChristoforo.

The Court: Yes.

Q. Now, who was in charge downstairs in the Four Corners Lounge? A. Joey Oreto.

Q. Joey Oreto? A. Right.

Q. Do you know whether or not Joey had a brother? A. Yes.

Q. What was his name? A. Frank Oreto.

Q. And, did Frank work in there, too? A. Well, Frank helped out his brother.

Q. He helped out Joey? A. Yes.

Q. Where? A. In both places.

Q. In the Four Corners? [618] A. Yes.

Q. And, in the Attic? A. Right.

Q. Do you know Carmen Gagliardi? A. No.

Q. Do you see this man seated on the left down here?

Mr. Balliro: I object.

A. Yes.

Q. Have you ever seen him before?

Mr. Balliro: Please, I have an objection pending, Mr. Irwin.

The Court: What is your objection?

Mr. Balliro: I object to his directing his attention to my client, if your Honor please.

Mr. Irwin: If your Honor pleases, I don't expect he is going to identify him.

Mr. Balliro: I don't know what he is going to do.

The Court: The question is — He says that he does not know Gagliardi. Now, what is the question?

[623] Q. Would you point out in that exhibit where Mr. DeChristoforo is, to the jury, in relationship to where Mr. Lanzi is standing. A. (Indicating to jury.)

Q. Mr. Dello Russo, were you working the night of April 17, Monday night, 1967? A. Yes.

Q. What time did you come in to work that night?  
A. About 6:00, quarter of.

Q. Was Butch there then? A. Well, he opened up for me.

Q. And, where did you work tending bar that night?  
A. Up in the Attic Lounge.

Q. Do you recall what the weather was like that night?  
A. I remember when I went home it was raining.

Q. What time did you go home that night from the Attic Lounge? A. About quarter past 2:00 — 2:00 or quarter past 2:00.

Q. And, you worked up there tending bar until about quarter past 2:00? A. Right.

[624] Q. When you left at quarter past two, was Butch there? A. Yes.

Q. All right. And before you left that night at quarter past two, could you tell us what Butch was doing at approximately quarter past two?

Mr. Smith: Pardon me, Your Honor. Now, I can understand the motivation, but I assume that the District Attorney is constantly referring to Mr. DeChristoforo as Butch.

The Court: Rephrase the question.

Mr. Irwin: I am sorry.

Q. When I refer to "Butch", I am sorry. You understand that I mean Mr. DeChristoforo, is that correct? A. Yes.

Q. Where was Mr. DeChristoforo when you left at quarter past two? A. Well, as usual, he was getting everybody out.

Q. What do you mean by "getting everybody out"? A. Well, he was calling, "It's all over, fellows. Let's go."

Q. "Let's go." Okay. Was there anybody else near Mr. DeChristoforo there, when you left at [625] quarter past two, that you know? A. Not near him, like, you know what I mean, whoever was at the front, like, I tell you, when you get through there, you know, you're through.

Q. Okay. You know you're through, right? A. Well, the go-go, I can't stand that loud music.

Q. They have go-go dancers up there? A. At the time, yes.

Q. All right. Now, was Mr. Frank Oreto there when you left at quarter past two? A. Yes.

Q. And how far away was he from Mr. DeChristoforo at quarter past two when you left? A. Frank was at

the bar, and Mr. DeChristoforo was having, you know, emptying the place out of customers.

Q. And Frank Oreto was standing at the bar, is that right? A. Yes.

Q. Did you have some money with you that night? A. Yes.

Q. — from the bar? A. Yes. I gave the money to Frank to give to his brother.

[626] Q. You give — you gave the money to Frank Oreto at quarter past two to give to his brother? A. Right.

Q. All right. Do you have any idea of how much money it was? A. No, I don't. At the time, no.

Q. No idea at all? A. No.

Q. Don't know Carmen Gagliardi? A. No.

Q. Did you see Joseph Lanzi there that night? A. No.

Mr. Irwin: Okay. That is all, Mr. Dello Russo.

*Cross-Examination by Mr. Smith:*

XQ. Mr. Dello Russo, what is the closing hour of — A. Two o'clock.

XQ. Two o'clock. And Mr. DeChristoforo worked up there as manager? A. Right.

XQ. And I think you said his function, <sup>as</sup> part of his function, at least, was to see to it that nobody [627] was served drinks after closing hours? A. Right.

XQ. And to have them leave, right? A. Right.

XQ. And at times there would be people there who had a drink on the bar or at the table, if there are tables there, before two and were allowed to finish their drinks, is that so? A. Oh, yes.

XQ. So that someone might not be ready to leave until quarter past two or 20 past two or maybe half past two, is that right? A. Yes.

XQ. And there was nothing unusual about the place closing down and you leaving around quarter past two or so? A. No.



XQ. And nothing unusual about Mr. DeChristoforo asking the people who were — A. No.

XQ. — in there to leave because — A. That is the procedure.

XQ. All right. Had you seen — strike that.

Mr. Smith: That is all.

. . .

[628] SUSAN MORRISON, Sworn

*Direct Examination by Mr. Irwin:*

. . .

[629] Q. In what capacity? A. Secretary.

Q. At some particular location at Harvard? A. Graduate School of Education.

Q. All right. How old are you, Miss Morrison? A. Twenty-nine.

Q. All right. Directing your attention back to April 17 of 1967, a Monday night, did you have an occasion to be in Boston that night? A. Yes.

Q. All right. Could you tell us, bringing your attention to the late evening of hours going into the early morning hours of April 18, whether or not you had an occasion to go to an establishment known as the Attie Lounge? A. Yes.

Q. Could you tell the jury where that is located, if you recall? A. It's on Stuart and Tremont.

. . .

[632] Q. All right. And would you tell us, if you would, please, whether or not — will you tell us, if you would, please, whether or not when you got up there that morning, you saw anybody that you knew up there, apart from the people that you went up with? A. What do you mean? Who I knew?

Q. Well, let me ask you this: Let me put it another way. At that time did you know a man by the name of Benja-



min or Butch DeChristoforo? A. I knew who he was.

Q. And by what name did you know him? A. Butch DeChristoforo.

Q. All right. Is he here in the courtroom? A. Yes.

Q. Would you indicate to the jury and to His Honor where he is seated in the courtroom? A. Sitting over there (pointing).

Q. Pardon? you have to speak up into that microphone, please. A. He is sitting behind the woman leaning on her elbow.

Q. You see the two men seated in the rear of the courtroom? [633] A. Yes.

Q. As you look at them, can you tell us which one he is? A. The one on the right.

Q. As you look at him? A. Yes.

Mr. Irwin: May the record show that she indicated the defendant DeChristoforo?

The Court: Yes.

Q. So you say you knew him by the name of Butch DeChristoforo? A. Yes.

Q. When you got there that night at 1:15, did you see Butch DeChristoforo? A. Yes.

Q. All right. Do you know or did you know at the time a gentleman by the name of Carmen Gagliardi? A. Yes.

Q. All right. Keep your voice up, please. Would you tell us, Miss Morrison, whether or not you saw Carmen Gagliardi that morning at the Attic Lounge? A. Yes.

Q. And how long had you known Carmen Gagliardi? [634] A. I had seen him, I don't know how long.

Q. You will have to keep your voice up, please. A. I don't know.

Q. All right. Is he seated in the courtroom? A. Yes.

Q. Would you indicate where he is seated? A. Here on the left.

Q. All right. Did you speak to Carmen Gagliardi that night? A. Yes.

Q. And was it when you first arrived? A. Yes.

Q. Keep your voice up, please. A. Yes.

Q. Do you recall what you said to him and what he said to you? A. He said: hello.

Q. He said hello. All right. Did you speak to Mr. DeChristoforo that night? A. No.

Q. Pardon me? A. No.

Q. All right. Now, how long were you there, Miss Morrison? [635] A. Until closing, two o'clock.

Q. Until two o'clock? A. Yes.

Q. All right. And at the time that you left, did you say goodnight to either one of these two men as you left? A. I think I might have said goodnight to Carmen.

Q. To Carmen? A. Yes.

Q. Did you know Joe Lanzi? A. No.

Q. All right. Did you know Frank Oreto? A. No.

Q. Pardon me? A. No.

Q. As you went out at two o'clock, Carmen Gagliardi was there, is that correct? A. Yes.

Mr. Irwin: That's all.

*Cross-Examination by Mr. Smith:*

XQ. Miss Morrison, did you know that Carmen Gagliardi lived in Medford? A. No.

[636] XQ. Did you know that? A. You mean, do I know that now?

XQ. Well, all right. Do you know it now? A. Yes.

XQ. Did you know what Benjamin DeChristoforo lived in Stoneham? A. No.

Mr. Smith: That is all.

Mr. Balliro: I have no questions.

Mr. Smith: Oh, pardon me.

XQ. (Mr. Smith, continuing cross) Was it raining very hard when you left? A. Yes.

Mr. Smith: That is all.

The Court: That is all.

Mr. Irwin: Thank you.

(Witness excused.)

Mr. Irwin: I call Montgomery Talbot, if Your Honor please, the State Police chemist.

Mr. Smith: Before he starts off, may we have a 5-minute recess?

The Court: Yes. It is about time to have a 5-minute recess so we will take one.

(Recessed at 3:30 p.m.)

[673] WILLIAM F. CUMMINGS, Sworn

*Direct Examination by Mr. Irwin*

Q. Mr. Cummings, would you speak into the microphone and identify yourself. A. William F. Cummings.

Q. And your home address, sir? A. Main Street, Reading.

Q. And you are a State Police Officer? A. Yes, sir.

Q. How long have you been a State Police Officer? [674]  
A. Fifteen years.

Q. Mr. Cummings, directing your attention back to April of 1967, you were employed, were you not, as a ballistics by the State Police? A. Yes, sir, I was.

Q. Would you tell the jury if you would please, of your background and experience in ballistics? A. I was a member of the State Police Officers for fifteen years and for two years I was assigned to the Firearms and Identification Bureau, State Police Headquarters. During this period I had not only received specialized training from the experts of the Commonwealth, but also in-service training in small arms plants. I have examined approximately 800 to 1000 weapons of all descriptions. I conducted approximately 750 microscopic comparisons and examinations, consisting of bullets, cartridge casings and related ballistics material. I

have had the privilege to qualify before the Superior Courts of the Commonwealth as a firearms identification technician.

. . .

[676] Q. Would you describe to the jury your observations of these two weapons when you first saw them. A. The Rohm derringer was in a half-cocked position, which means that the hammer was halfway to the rear of the revolver. The .38 special Smith & Wesson revolver had a closed cylinder, and I did not know what it contained until I had opened it.

Q. When you opened the .38 Smith & Wesson snub-nosed revolver, what did you observe then? A. I observed that it was loaded with four live rounds of .38 special caliber ammunition and one discharged casing.

Q. I show you first of all this weapon here which is Exhibit 2. If you would examine that Mr. Cummings please. A. Yes, sir.

Q. Do you recognize that gun? A. Yes, sir, it's one of the two weapons I received from Officer Carr on the morning of April 18.

Q. Now you indicated to the jury that when you received that particular weapon that it was in a [677] half-cocked position. Would you indicate how that would be. A. The hammer was halfway to the rear.

Q. The hammer of the weapon was halfway to the rear? A. Yes, sir.

Q. Did you examine that particular weapon Mr. Cummings that morning to see whether or not it was loaded? A. Yes, sir, I did.

Q. And what discovery did you make with reference to that? A. It was loaded with two .38 special caliber rounds of ammunition.

Q. Now can that weapon hold more than two rounds of ammunition? A. No, sir, it cannot.

Q. Will you show the jury how that weapon is loaded, if you would please. A. I am going to have to remove this tag to break it open.

Mr. Irwin: Do I have the permission of the Court to have the tag temporarily removed?

The Court: Yes.

A. There is a locking device on the right side of the receiver. And when it is moved forward, [678] the derringer pistol breaks open, and two rounds of ammunition have to be manually placed in the pistol.

Q. So as I understand it then, the weapon is opened in this fashion? A. That's right.

Q. And then there are two rounds placed in it? A. Yes, sir.

Q. Is this weapon an automatic weapon? A. No, sir, it is not.

Q. What type of a weapon is it as far as firing is concerned? A. It is a semi-automatic which means that each time we want to discharge the weapon, the trigger has to be pulled on each individual shot.

Q. Now with reference to this particular weapon, would you explain to the jury whether or not this weapon can be fired without the hammer being cocked? A. No, sir. To make it operate, the hammer has to be drawn fully to the rear, pressure exerted on the trigger allowing the hammer to fall forward.

Q. So that in the event that after having loaded [679] this weapon you desired to fire two shots off, you would have to cock it fully, is that correct? A. That's correct, sir.

Q. Fire the gun like that? A. Yes, sir.

Q. And then cock it again? A. That's right.

Q. Is that correct? A. Yes, sir.

Q. So that this gun will not fire from the forward position? A. No, sir, it will not.

[680] Q. All right. Is it safe to say, then, that when the gun is half-cocked, that expedites firing the gun to the extent that whoever wants to use it thereafter just has to pull it back that one step further and fire the gun?

A. Yes, sir.

Q. All right. Now, I take it that you observed that that particular weapon, with its two rounds of ammunition, had not been fired. A. No, sir, it had not.

Q. All right. You have the two rounds of ammunition with you? A. Yes, I do.

Q. Now, with reference to this .38 caliber snub-nosed revolver, would you see if you can identify that, please?

Mr. Smith: What exhibit?

Mr. Irwin: It's Exhibit 3, I believe. (After checking) Exhibit 3.

Q. Can you identify that, Mr. Cummings? A. This is the second of the two guns I received from Officer Carr of the Medford Police Station.

Q. All right. And when you received this, did you make an investigation to see whether or not [681] that gun was loaded? A. Yes, sir.

\* Q. All right. And, first of all, tell us whether or not the gun was loaded? A. It was loaded with four live rounds of .38 special caliber ammunition.

Q. Did it have anything else in it? A. It had one discharged casing located directly underneath the firing pin.

Q. There was one discharged cartridge casing directly under the firing pin? A. Yes, sir.

Q. All right. Now, how many cylinders are involved in that particular weapon? A. There's five in this.

Q. All right. So that when it's fully loaded, it contains five rounds of ammunition? A. Yes, sir.

Q. All right. Can we show it to the jury, the process of opening the gun for the purpose of loading it? Can you indicate to the jury how that's done? A. There is a cylinder catch on the left side of the receiver. When it's pushed to a forward . . .

[684] Q. So that this weapon had been fired? A. Which indicates that the weapon had been fired, yes.

Q. Now, are these the only two weapons that you received that particular morning? A. Yes, sir, it is.

Q. Having received those particular weapons, did you then go to the Gaffey Funeral Home? A. Yes, I did.

Q. Were you present when Dr. George Katsas performed an autopsy on the body of Joseph Lanzi? A. Yes, sir, I was.

Q. Would you tell the jury whether or not you observed him remove any bullets from the body of Joseph Lanzi? A. Yes, sir, I did.

Q. Will you tell us, would you tell the jury where or from what parts of the body he removed those bullets in your presence? A. He removed one spent bullet from the head of the decedent, and he removed three bullets from the chest cavity of the decedent.

[688] Q. All right. Now, will you tell the jury what striations you observed on the two test specimens that you fired from that particular Exhibit 3? A. The striations found on the recovered bullets — and there were numerous, many — were then compared against the markings on the bullet recovered from the head of the decedent; and as a result of these microscopic examinations, I am of the opinion that this bullet that was recovered from the head of the decedent was fired from this .38 Smith & Wesson revolver and no other weapon.



Q. So it is your opinion, then, based upon your examination, that the bullet that was removed from Joseph Lanzi's head was fired by Exhibit 3 and no other weapon? A. That is right.

. . .

[693] Q. How many other bullets did you get from Dr. Katsas? A. I received three other bullets.

Q. All right. And did you observe where those were taken from in the body of Joseph Lanzi? A. In the chest area, in the stomach.

Q. All right. And what, if anything, did you do with those particular bullets? A. I conducted the same kind of an examination on these three bullets. One of them weighed approximately 83.7 grains. No. 2 weighed approximately 84 grains. And the third bullet weighed 84.6 grains. As a result of physical examination, I am of the opinion that they are three spent .32 Smith & Wesson caliber ammunition.

Q. All right. A. As a result of microscopic examination of these three bullets, one against each other, I am — I was of the opinion on this date that they were fired from the same weapon, which weapon I did not have in my possession at that time.

Q. But your preliminary tests indicated that the three .32 caliber bullets that you received from [694] the body of Joseph Lanzi had been fired from the same weapon? A. Yes, sir.

Q. And that weapon, as of April 18 or in April, 1967, was not at that point in your possession, is that right? A. No, sir, it was not.

Q. All right. Now, at the autopsy did you observe the body of Joseph Lanzi before the doctor opened the chest cavity? A. Yes, sir, I did.

Q. All right. I show you this photograph which is Exhibit 8 in this trial. Do you recognize that? A. Yes, sir.



Q. And does that photograph fairly indicate the position of the wounds that you saw in the chest of Joseph Lanzi on that particular morning before the body was opened? A. Yes, sir.

[695] Q. And did you observe those particular holes there? A. Yes, sir, I did.

Q. Would you tell the jury what you observed about them? A. I observed there were large concentrations of powder residue around the hole on the left side.

Q. Did you observe apparently how many holes there were there? A. There appeared to be two.

Q. And in fact, there were three bullets recovered, is that right? A. Yes, sir.

Q. Based on your observations and analysis of that particular wound, did you reach an opinion as to how close the gun was held to that particular body when it was fired with reference to that area of the body? A. Yes, sir, I did.

Q. What is your opinion on that? A. I would say within two inches. The end of the muzzle was no more than two inches away from the body.

Q. Was no more than two inches away?

. . . .

[697] . . . a cleaning solvent. It was in a very dirty, rusty condition. And after it had soaked approximately a day or two days, and it came cleaner, I test-fired this weapon in the same manner as I testified, and I recovered bullets.

Q. You fired it into some cotton? A. Into the cotton because of the test specimens; and compared those test specimens against the three .32 S & W caliber spent bullets I had received from Dr. Katsas on April 18, 1967.

Q. And based on your comparisons, did you reach a conclusion with reference to those? A. Yes, sir, I did.

Q. Would you tell the jury what your opinion is in that regard? A. In my opinion the three .32 caliber S & W spent bullets recovered by Dr. Katsas from the body of the decedent were fired from this Harrington & Richardson revolver, and from no other weapon.

Q. Do you have those three bullets with you? A. Yes, sir, I do.

Q. Would you produce those please. A. (Producing same.)

Q. Sir, these are the three .32 caliber bullets [698] that you recovered that morning or you took from Dr. Katsas at the Gaffey Funeral Home which you observed him remove from the chest cavity of Joseph Lanzi? A. That is right, yes, sir.

Mr. Irwin: If Your Honor please, I offer these three bullets.

The Court: They may be marked.

Why don't you, if the legend is satisfactory to counsel, why don't you put them in the envelope. Were they all in separate envelopes?

Mr. Irwin: Yes, Your Honor. I will put them in one.

The Court: Show them to counsel.

Mr. Smith: No objection.

Mr. Balliro: No objection.

Mr. Irwin: I will put it in this particular envelope which the record will show is an envelope which he removed one of these .32 bullets, but the three are going in there together.

(Three spent bullets received and marked Exhibit 29.)

Q. Now with reference to this particular exhibit [699] which is Exhibit 18, which you just testified to in your judgment was the weapon that fired these three bullets into the body of Joseph Lanzi, could you tell the jury, if you would please, how that weapon fires. A. That weapon fires

on the same theory as the .38 Smith & Wesson revolver. It can be fired either in a single action position or a double action position.

Q. Would you tell the jury, if you would please, how much trigger pull is required to set this gun off? A. When I measured the trigger pull of that weapon, after I cleaned it, it measured approximately eight to nine pounds single action.

Q. Eight to nine pounds single action? A. Yes, sir.

Q. And how much double action? A. I didn't measure that one in a double action position due to the condition of the weapon.

Q. And would you say that the eight to nine pounds was due to the condition of the gun at the time you got it? [700] A. I would say so. That, and its age.

Q. How old is that gun incidentally? A. Better than fifty years old.

Q. Ordinarily, if the gun had not been in the condition that you had it, do you have an opinion as to what the trigger pull would be? A. If the weapon is in decent condition, it would again average three to five pounds single action, approximately ten pounds on double action.

Q. Were there any other things that you received from Dr. Katsas at the autopsy? A. Yes, sir, there were.

Q. What else was there? A. I received five fragments of lead which the doctor recovered from the head of the decedent.

Q. Is there anything significant about those? A. Only that they are the fragments of lead. There was no discernible impressions on the fragments, therefore, I am unable to say from what weapon they came from.

Q. Is it safe to say that the fragments of lead would be caused by the bullet, the .38 caliber bullet that you re-

covered in the lead shearing off as it hit various objects? [701] A. It would be, yes, sir.

Q. With reference to weighing the bullets, for example, the .38 caliber bullets that you spoke of, you indicated that they were different weights? A. Yes, sir.

Q. What would cause the variance of the weight? A. The lead shearing off.

Q. The lead shears off? A. Shears off; or it gets damaged from whatever it hits, and there will be noticeable weight difference even though they are all the same caliber.

Mr. Irwin: May I have just one moment, Your Honor.

Q. Would you tell the jury, if you would please, with reference to Exhibit 18: what you found in it when you first opened it after having it presented to you by Lieutenant Hanley of the Medford Police? A. I found two discharged .32 caliber casings. I found two live rounds of .32 caliber S & W ammunition; and one chamber in the cylinder was completely empty.

Q. Now would you tell us, if you would please, whether you have those discharged cartridge ...

[704] Q. And you were satisfied that the discharged casings were fired with the recovered bullets? A. That's right, from the same Harrington and Richardson revolver.

Q. And, no other weapon? A. No other weapon.

Mr. Irwin: May I have the three spent cartridge casings and bullets marked as one exhibit?

The Court: Show them to counsel.

Mr. Smith: No objection.

Mr. Balliro: No objection.

The Court: It may be marked.

Mr. Irwin: Again, this envelope bears writing, if Your

Honor please, but it has no reference, I don't think to anything.

(Three spent cartridge casings and one bullet received and marked Exhibit 30.)

Q. With reference to the three weapons, and particularly to the Rohm derringer and to the .38 caliber snub-nosed revolver, are those all firearms within the meaning of the general laws of the Commonwealth of Massachusetts?

. . .

[708] Q. Or, did you observe any powder burns or nitrites on the left sleeve of the raincoat? A. No, sir, not that I recall.

Q. Assuming, Officer, that the arm of the deceased was hanging down in a normal position, would you normally expect to have found nitrites on the left arm or left sleeve? A. Depending on how far away the weapon was held, yes, sir.

Q. Having in mind it was held only two inches. A. I would think so.

Q. You would expect it? A. Yes, sir.

Q. And then Officer, is it fair to say that your opinion would be that the arm was probably raised at the time of the firing? A. No, I have no opinion on where his arm was, sir.

[709] Q. All right. But at any event — strike that. I show you Exhibit 4, Officer. That's upside down. I ask you whether or not if the arm were in that position as it appears, the left arm in that position as it appears in Exhibit 4, that you would ordinarily expect to find nitrites or powder burns on the raincoat of the left arm? A. If the weapon was within —

Q. Two inches? A. — two inches.

Q. Yes. A. It's possible, yes, sir.

Q. Well, "possible". Is it your opinion that you would normally expect to find — A. You can find that, yes, sir.

Q. Now, then, with respect to the head wound, Officer, did you make any observations as to any powder burns or nitrites in that area? A. I looked for them, sir, and I did not observe any.

Q. At any event, Officer, having in mind the entrance wound that you saw in the head and having in mind that the bullet was recovered from in the

. . . .

[715] . . . or palmprints on that derringer? A. I don't know of any report, no, sir.

Q. At least, you don't know of any report of any print of DeChristoforo on that derringer, do you? A. I don't know of any report, sir.

Mr. Irwin: If Your Honor please, the Commonwealth will stipulate that there were no fingerprints found on any of these weapons.

Mr. Smith: Fine.

I have no further questions.

The Court: Mr. Balliro?

*Cross-Examination by Mr. Balliro:*

XQ. Did I understand you to say, Mr. Cummings, that with regard to the entrance wound on the head you made no observation of powder burns or nitrites? A. I didn't see any, no, sir.

XQ. Well, you did examine the head? A. I looked at it, yes, sir.

XQ. You felt that that was an important part of your duty there? A. Positively.

XQ. And, among other things, in looking at the head . . .

. . . .

[762]

JOSEPH A. SARNO, SWORN

*Direct Examination by Mr. Smith:*

Q. How old are you, Mr. Sarno? A. I am thirty-one.

Q. Where do you live? A. I live at 50 North Margin Street, in Boston, Massachusetts.

Q. Is that known as the North End section of Boston? A. Yes, it is.

Q. Are you married? A. Yes, I am married.

Q. Do you have any family? A. I have three children: six, four, and three weeks old.

Q. What is your occupation? A. I am a project manager in the computer systems department at Polaroid Corporation in Waltham.

Q. Do you have any training? Did you have training for that job? A. Yes, I do.

Q. What is your education?

Mr. Irwin: I object to this, if Your [763] Honor please.

The Court: What is the question?

Mr. Smith: What his education was.

The Court: Excluded.

Q. How long have you lived in the North End section of Boston? A. All my life except for two years in the military service; and I have a job in Washington, D.C. for the Government for a six-month period.

Q. Do you know Benjamin DeChristoforo? A. Yes, I do.

Q. Do you recognize him in the courtroom here? A. Yes, I see him.

Q. Is he the gentleman sitting in the dock here? A. Yes.

Q. How long have you known him? A. Most of my life. I would say approximately 20 or more years.

Q. During the period of time that you lived in the

North End, did he live in the North End of Boston?  
A. Yes, he did.

Q. Did you know a Joseph Lanzi? A. Yes, I did know Joseph Lanzi.

[764] Q. How long did you know Joseph Lanzi? A. Approximately the same period: twenty or more years.

Q. Do you know whether or not Benjamin A. DeChristoforo has the reputation in the community for honesty?

Mr. Irwin: I object.

A. Yes, I do.

Mr. Irwin: I object.

The Court: What is the ground for your objection?

Mr. Irwin: The ground is that counsel has done nothing to establish that he ever discussed it with other people. There has been no foundation laid for this testimony whatsoever.

The Court: All right. The question is excluded and the answer may go out.

You may put the question again to establish the proper foundation.

Mr. Smith: I don't know of any other way to put it except to ask the preliminary question and then go on from there, Your Honor.

Q. Do you know whether or not he has the reputation of honesty in the community? A. Yes, I do.

Q. And, what is that knowledge based upon? [765]  
A. That is based upon my own personal feeling and discussions with other friends, and neighbors and people that know both of us.

Q. What is his reputation for honesty in the community?

Mr. Irwin: I object, if Your Honor please.

The Court: You may have it.

The Witness: May I answer that?

The Court: Yes.



A. His reputation is an honest person.

Mr. Irwin: I object and ask that the answer be stricken.

The Court: It may stand.

Q. Do you know whether or not he has the reputation in the community for violence or non violence? A. Yes, I do.

Q. What is that based upon? What is your knowledge of that based on? A. Well, it is based on a couple of things: one, I have never known or have heard of anything that involved him in any way with violence; and in addition, the same subject as his honesty, etcetera, in connection with violence in light of recent events, especially, has been discussed, [766] and he is in my opinion and in the opinion of others in our community, to be a non violent person. No question in my mind.

Q. Do you know what his relationship was with Joseph Lanzi? A. Yes, they were extremely close friends.

Q. Do you whether Benjamin A. DeChristoforo has a nickname? A. Yes.

Q. What is that? A. Butch.

Q. How long has he been known by that name? A. I would say since probably before I knew him, and that was early childhood.

Mr. Smith: I have no further questions.

[767] *Cross Examination by Mr. Irwin:*

XQ. Mr. Sarno, when did you first realize that you were going to be a witness in this case? A. A couple of days ago.

XQ. A couple of days ago? A. Yes.

XQ. That was the first time you were ever asked to be a witness in this case, is that correct? A. I would say about one week ago, exactly.

XQ. After we started impanelling this jury, is that correct — after this trial started? A. I believe it was the

same day as the impanelling of the jury; Tuesday it might have been, I'm not exactly certain.

XQ. So, up until that time, bearing in mind that your friend, Benjamin, was arrested last November, up until this past week you had not been asked to be a witness in connection with this case, is that right? A. That's right.

XQ. Can you tell the jury some of the people that you discussed the reputation of your friend, Mr. . . .

[784] PHILIP ANTHONY LAMONACA, SWORN

*Direct Examination by Mr. Smith:*

Q. What is your full name? A. Philip Anthony LaMonaca.

Q. Where do you live, Mr. LaMonaca? A. 135 Salem Street, Boston.

Q. How old are you? [785] A. I am 29 years of age.

Q. Are you married or single? A. Yes, I am married.

Q. Do you have a family? A. Yes. I have one child and one on the way next month.

Q. What is your occupation? A. Research and development technician for Polaroid Corporation.

Q. And you live in the North End section of Boston?

The Court: What corporation was that?

The Witness: Polaroid Corporation.

Q. How long have you lived in the North End of Boston? A. All my life, except for two years. I moved to Medford on Albion Street, and also my time in the service, three years.

Q. Do you know Benjamin A. DeChristoforo? A. Pardon me?

Q. Do you know Benjamin DeChristoforo? A. Yes.

Q. How long have you known him? A. Practically all my life.

Q. Do you know whether he has a nickname? A. Yes, I do.

[786] Q. What is it? A. Butch.

Q. And how long has he had that nickname? A. As far as I can remember, when we were children.

[787] Q. Do you know Joseph Lanzi? A. Yes.

Q: "Did" you know Joseph Lanzi? A. Yes, I do — did.

Q. Did you know what relationship there was between Joseph Lanzi and Benjamin A. DeChristoforo? A. Close friends.

Q. And do you know whether or not Benjamin A. DeChristoforo had the reputation in the community for honesty? A. Yes, I do.

Q. And what do you base your knowledge of his reputation on? A. On honesty?

Q. Yes. A. Well, some of my own past experience, as far as specifically dealing with money, my own personal experiences with Butch and also other experiences which I have heard on occasion that he, you know, that he has had with other people, other friends of mine, people that we hung around together —

Q. What is his reputation for honesty? A. Well, I mean, like I can cite some examples.

Q. No. What is the reputation that he had? [788] A. Oh, he is an honest person.

Q. And do you know whether or not he has a reputation in the community for violence or non violence? A. His reputation is that of non violence.

Mr. Smith: I have no further questions.

*Cross Examination by Mr. Irwin:*

XQ. Mr. LaMonaca, who did you discuss his reputation with? A. His reputation?

XQ. Yes. A. Well, I am trying to think of, you know, particular people that —

XQ. That is — A. — individuals as such.

XQ. That is what I'm interested in, too. A. I think I can remember one example in particular.

XQ. No. Can you tell us who you discussed it with? A. The deceased, Joseph Lanzi.

XQ. You talked with Joseph Lanzi about it? A. Yes.

XQ. And when was that? A. During summer vacation out at Butch's cottage.

XQ. When?...

. . .

[793] . . . that it's the person that I did — I am trying to recall back in my memory the people that I did discuss it with at the time. I don't think I really would truthfully say that I discussed it with anybody in particular, but I know that I have discussed it with friends of mine.

XQ. And what did you say to them? "Gee, is Benjamin a violent fellow or a non violent fellow?" Is that how the discussion came up? A. No, no. Situations like we played sports together, such as football. One particular instance when we played —

XQ. When was this? A. I would say about 12 years ago.

XQ. About 12 years ago? A. Or more.

XQ. At that time Mr. DeChristoforo was about 16 years old, is that right? A. I believe Butch is about 31. If my math is correct, then —

XQ. If he is 31, then he was 19? When he was about age 19, that's when you discussed his reputation for violence or non violence in the community? A. He might have been a little younger than 19. We . . .

. . .

[794]

WALTER J. LINDSAY, Sworn

*Direct Examination by Mr. Smith:*

Q. What is your full name? A. Walter J. Lindsay.

Q. And how old are you, Mr. Lindsay? A. Seventy.

Q. Where do you live? [795] A. 9 Franconia Street, Dorchester.

Q. And what is your occupation? A. Retired police officer.

Q. And where were you a police officer before you retired? A. North End, Division 1.

Q. Police officer in the City of Boston? A. Yes, sir.

Q. And when did you retire? A. March 1, 1966.

Q. And for how long had you been a police officer in the North End section of the City of Boston? A. Thirty years.

Q. And would that cover the period immediately prior to 1966? A. Yes, sir.

Q. Would it be 1936 to 1966? A. I was in the North End in '33, too, but I was up at the other end of it.

[796] Q. And, you were assigned to the North End section of Boston? A. I was.

Q. During that period of time did you have occasion to familiarize yourself with the residents of the neighborhood? A. I did.

Q. Did you get to know the DeChristoforo family? A. I did.

Q. Did you get to know Benjamin A. DeChristoforo? A. I did.

Q. And I am pointing to the young man in the dock. A. I know him.

Q. During the thirty odd years that you were down the North End, did you have occasion to learn of his reputation for honesty? A. I did.

Q. What was his reputation for honesty? A. Truthful and honest.

Q. Did you have occasion to learn of his reputation for violence or non-violence? A. Non violence. Never knew him to be a violent man. . . .

[800] A. . . . I know where it is.

Q. You do? A. Where the section is, but I don't know where this place is.

Q. Do you know the Attic Lounge, or the Four Corners Lounge? A. No.

Q. Did you know he was the manager down there? A. I did not.

Q. You didn't? A. No, I didn't.

Q. And, the last time you saw him was in 1966 when you retired, is that right? A. In around that time, probably '65 — or late '65.

Q. So, you hadn't seen him for two years prior to this murder, is that right? A. That's right.

Q. So, you don't know what his reputation was in the community at the time the murder was committed? A. No, I don't, no. But, I frequent there at least once a week for a haircut, and I do talk to all the people down there, and there is nobody had any bad word about his reputation.

[801] Q. During all that time nobody in the barber shop ever told you that Benjamin was now the manager of the Attic Lounge up on — A. No, no, they seemed to be shocked when this happened.

Q. Were they shocked during the two years from 1966 — Mr. Smith: I can't hear you.

The Court: Put your question a little louder, Mr. Irwin.

Q. Did you say that you were shocked, or somebody else was shocked? A. They were shocked — the residents of the North End.

Q. When Mr. Lanzi got murdered? A. Shocked that this fellow was involved in anything like that.

Mr. Irwin: That's all.

Mr. Smith: Thank you, Mr. Lindsay.

Mr. Balliro: May we approach the bench, your Honor?

The Court: Yes.

(Witness excused.)

. . .

[825]

MORNING SESSION

10:20 a.m.

(Lobby conference as follows:)

The Court: In the trial of the above captioned case, yesterday, April 28th, Mr. Smith proposed to offer as a material exhibit and have it marked, the indictment containing all the notations in the case of Commonwealth vs Oreto — Oreto being one of the persons who the Commonwealth contends was involved in the venture together with the two defendants who are presently on trial.

The notations include, by the way, a plea of "guilty," which was accepted by the Court, and the life sentence which was imposed upon — a plea of "guilty" to the crime of murder in the second degree, which was accepted by the Court, and a subsequent life sentence, which was imposed upon Oreto.

Mr. Smith offered this yesterday, and it was excluded by the Court on the grounds of lack of materiality in the instant cases, and I am marking the document, the indictment, for identification, Exhibit No. F for identification.

[826] That will constitute Mr. Smith's offer of proof since his rights have been saved by the Court in this regard.

Is that adequate?

Mr. Smith: That's correct.

EXCEPTION No. 95

The Court: Now, in addition, Mr. Smith in this lobby conference proposes to offer into evidence two documents.

Would you want to describe them for the record.

Mr. Smith: For the record, I offer a photo copy of the Commonwealth of Massachusetts Probation Department record of —

The Court: You are offering them as material exhibits?

Mr. Smith: I might as well do it now. — showing the record of arrests and convictions of the defendant Benjamin DeChristoforo.

It has been agreed that there is no objection to the form of the document.

The Court: That is true, Mr. Irwin?

Mr. Irwin: Yes, it is, if your Honor please.

[827] The Court: And, I have ruled that such an offer would be fruitless because it would be excluded by this Court, again, on the grounds of materiality; and I save the rights of Mr. Smith in this regard.

And, I will mark this G for identification.

EXCEPTION No. 96

That will constitute Mr. Smith's offer, is that right?

Mr. Smith: Yes, your Honor.

I also will offer a photo copy of a Boston Police Department record furnished in answer to a summons requiring the keeper of records to bring any and all records showing arrests and/or convictions of the defendant Benjamin A. DeChristoforo.

This document is not objected to as to form.

The Court: That is true, is it not, Mr. Irwin?

Mr. Irwin: That is, if your Honor please.

The Court: In this connection, the mere fact that Mr. Smith has not offered them [828] formally in the courtroom is of no account, and they may be viewed in the light



of the circumstances, if he had offered them in the courtroom they would be excluded on the grounds of lack of materiality. And, his rights in this regard are saved.

It is agreed that the form of the document is not at all objected to, but it is merely the substance of it, it's lack of materiality — I take it is the basis of your objection?

Mr. Irwin: Yes, it is.

The Court: Mr. Smith's rights are saved and that document may be marked for Identification No. H, and may constitute Mr. Smith's offer of proof in this matter.

Is that satisfactory?

Mr. Smith: It is, your Honor.

EXCEPTION No. 97

The Clerk: Can I have that original indictment of Frank Oreto and have the envelope marked instead of the original indictment?

The Court: Yes. I see no objection to that?

[829] Mr. Smith: No objection to that.

(Original indictment of Oreto marked F for Identification.)

(Photocopy of Commonwealth of Massachusetts Probation Dept. record of Benjamin DeChristoforo marked G for Identification.)

(Photocopy of Boston Police Dept. record of Benjamin DeChristoforo marked H for Identification.)

(End of lobby conference — 10:30 a.m.)

[830] (The Court came in at 10:40 a.m., Tuesday, April 29, 1969.)

The Court: Poll the jury.

(The jurors were polled and each answered to the calling of his name.)

(Both defendants were present.)

The Court: All right Mr. Smith.

Mr. Smith: William Petrigno.

## WILLIAM PETRIGNO, SWORN

*Direct Examination by Mr. Smith:*

Q. What is your full name? A. William P. Petrigno.

Q. Where do you live, Mr. Petrigno? A. 34 Crystal Circle, Burlington, Massachusetts.

Q. Are you married or single? A. Married.

Q. Do you have a family? A. No family.

Q. What is your occupation? A. I work at the House of Representatives at the State House, assistant door-keeper.

Q. How long have you been working up there? A. Eleven years.

[831] Q. Prior to your living in Burlington — is it? A. Yes.

Q. — where did you live? A. The North End.

Q. The North End of Boston? A. Yes.

Q. How long had you lived in the North End of Boston before moving to Burlington? A. 22 years.

Q. And how long ago did you move to Burlington? A. Three years ago.

Q. Now do you know Benjamin A. DeChristoforo? A. Yes, I do.

Q. How long have you known him? A. A long time.

Q. Well approximately how long? A. School days. From school days.

Q. Since you moved from the North End to Burlington, did you have occasion to visit in the North End? A. Yes.

Q. How frequently? A. Very frequently. Weekends.

Q. Do your parents still live there? A. Yes, they do, my mother and my brothers.

[832] Q. Do you know whether or not Benjamin A. DeChristoforo has a reputation in the community for honesty?

A. Yes, sir.

Q. What is that reputation? A. I have always known him to be very good and excellent.

Q. During the time that you worked at the State House did you observe Benjamin A. DeChristoforo up there? A. Yes.

Q. And what was his job up there? A. He was a Page in the State Senate.

Q. Do you know for how long? A. Approximately seven or eight years.

Q. And while he was a Page up in the Senate, do you know whether or not he had a reputation in the State House community for honesty? A. Yes, sir.

Q. What was that reputation? A. They all — and I say they all, sir — the Senators, and the Representatives and the people he worked with, they all admired him and respected him.

Q. Do you know whether or not while he was working up at the State House he had a reputation for [833] being a violent or a peaceful man? A. Peaceful man, non-violent.

Mr. Smith: That is all.

Mr. Irwin: No questions.

The Court: That is all.

(Witness excused.)

Mr. Smith: John Trulli.

JOHN G. TRULLI, Sworn

*Direct Examination by Mr. Smith:*

Mr. Smith: Is there a blackboard? Your Honor, could we use the blackboard? Well, let me see if it becomes necessary, it may not be.

Q. What is your full name? A. John G. Trulli.

Q. Where do you live? A. 52 Wentworth Street, Malden.

Q. What is your occupation? A. My occupation is parts and service coordinator and body shop manager.

Q. How long have you been in that business? A. 25 years, sir.

. . .

[851] The Clerk: 84,307, Carmen R. Gagliardi. 74,307, your default is removed, and probation is revoked and terminated.

77,686, Carmen R. Gagliardi. You will hearken to the sentence the Court has awarded against you: The Court having duly considered your offense orders that you be punished by confinement in the Massachusetts Correctional Institution at Walpole for a term of life.

77,687, Carmen R. Gagliardi, you will hearken to the sentence the Court has awarded against you: The Court having duly considered your offense orders that you be punished by confinement in the Massachusetts Correctional Institution at Walpole for a term not exceeding five years nor less than four years. This sentence to be served concurrently with the [852] sentence imposed this day on 77,686. And, on this sentence you have the right to appeal in writing within ten days to the Appellate Division of this Court from the sentence imposed this day; and that you stand committed to our common jail pursuant to your removal to said institution.

77,686 and 7, Carmen R. Gagliardi: credit of one hundred twenty-eight days will be so noted in the mitimus which will accompany you to said institution.

The Court: Now, we will have a very short recess before bringing the jury down.

I would like to see Mr. Smith and Mr. Irwin in my chambers, please.

(Recessed at 12:30)

(Court came in courtroom at 12:40.)

(Defendant DeChristoforo is present.)

The Court: Mr. Foreman, madam and gentlemen of the jury. You will notice that the defendant Gagliardi is not in the dock. He has pleaded "guilty", and his case has been disposed of.

We will, therefore, go forward with the [853] trial of the case of Commonwealth vs DeChristoforo.

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[854]

#### AFTERNOON SESSION

(The Court came in at 2:45 p.m.)

The Court: Poll the jury.

(The jury was polled and each answered to the calling of his name.)

(The defendant DeChristoforo is present.)

The Court: Are you now ready for argument, Mr. Smith?

Mr. Smith: Yes, Your Honor.

May it please the Court, Mr. Foreman and members of the jury. At this time I am called upon to make what is known as a closing argument. Just as you have been told that an opening argument, or an opening talk, an opening to the jury is not evidence, so a closing argument is not evidence.

It is my function to attempt to call your attention to such matters that have developed during the course of the trial as I feel will warrant, justify or require you to return a verdict of not guilty, it is Mr. Irwin's function, the prosecuting attorney who will make his closing argument after I make mine, and — and to which closing argument we have no response — to convince [855] you that you should return a verdict of guilty of murder in this case. And I am now addressing myself to the indictment involving murder.

There are, as you know, two indictments: one charging the defendant, Benjamin A. DeChristoforo, with murder,

and the other charging him with being in possession and control of guns.

Now of course, His Honor has instructed all of you when you were seated here as a group, and before you were selected for service on this jury, as to various rules of law and as to what the procedure is in a general way.

As you know, his function from what he has told you is to make rulings of law. It is the District Attorney's function, as I have outlined to you, is to attempt to convince you beyond a reasonable doubt that Benjamin A. DeChristoforo is guilty of murder. My function as defense counsel is also in the nature of an enforcement officer, just as Mr. Irwin is an enforcement officer attempting to enforce the law and to see to it that guilty people are punished, found guilty by jurors and punished by the Court — I, as a defense lawyer and as an officer of the [856] Court also am an enforcement officer. It is my duty and function and obligation to see to it that in the trial of a case of a person accused of crime that he shall be convicted only in accordance with the rules of evidence and only in accordance with the law, and that the law shall be enforced in that respect.

Now everyone deplores crime, and we especially deplore murder. And murder is a serious and evil crime. But the finding of a man guilty of the crime of murder, or for that matter of any crime, unless the jury finds him guilty in accordance with the rules of law, in accordance with the instructions given by the Court, in accordance with your obligations as jurors, that may well be a more evil crime. And I shall try to explain that to you as briefly as I can.

In this country we live under what is known as an accusatory system as distinguished from other countries who operate under an inquisitorial system. In this country, as His Honor pointed out to all the panel, when a person

is charged with a crime, it isn't the slightest evidence that he has committed a [857] crime.

The Commonwealth here says that Benjamin A. De-Christoforo murdered Joseph Lanzi either by personally firing five bullets into his body, or by acting in concert with others who fired four bullets into his body. And of course, that is an accusation. And there isn't any obligation upon the part of the person accused of crime in this country to prove his innocence. And this is what distinguishes our system of Government from other systems where they have the inquisitorial system, where persons can be arrested and must prove their innocence. And you as practical people who have been, many of you, in business lives, other than academic lives, so that proving one's innocence is a difficult if not an impossible thing to do at times.

And so, our system says: if you accuse a person of a crime you must prove him guilty of that crime and you must prove him guilty beyond a reasonable doubt — because it is so easy to make accusations, and because it is so easy to introduce evidence which is susceptible [858] of interpretations.

Our forefathers who established what I think is recognized throughout the world as the greatest system of democracy in the history of the world, were convinced that a person accused of crime must be proven guilty beyond a reasonable doubt. And that is why the Judge, Judge Sullivan, gave you certain instructions.

Now, as I understand it, His Honor is going to charge you with respect to the law tomorrow morning. Anything I may say to you as to what I think the law is — if I should touch upon it — you are to disregard. Anything that I say to you as to what I believe the facts are, you are to disregard unless it is your memory that those are the facts. And, of course, the same applies to the prose-

cuting officer: Anything that he tells you what his memory of the facts are or his understanding of the law is, is to be disregarded. You are the sole judges of the facts. No one can dispute your determination as to the facts. No one can appeal from your determination of the facts as distinguished from, if the Judge should make an incorrect [859] ruling of law, there is a method of appeal from an incorrect ruling of law.

[860] Now, the day after tomorrow, by Presidential proclamation, is known as Law Day. Years ago it was known as May Day in certain countries.

And, Law Day was established by Presidential proclamation several years ago for the purposes of endorsing the familiarity of the public, the American citizen, with the fact that we live under what is known as the rule of law; that the rule of law is what separates us from imperialistic nations, dictatorial nations, and countries that have different systems than we do.

We live under that rule of law, and that rule of law guides us and must be enforced. And, if after I have argued, and after Mr. Irwin has argued, and after the Judge has instructed you, you are convinced beyond a reasonable doubt that Benjamin A. DeChristoforo is guilty, legally guilty, of murder, then you have an obligation to find him guilty.

If, on the other hand, when you are in your deliberations, if you engage in conjecture, or surmise, or supposition, and say: well, it might have been this, or, it sounds like it should [861] have been that, or, it probably was this — you are violating your oath and you are not complying with the rule of law. And, if you came in with a finding of guilty, although no one would ever know that you violated your obligations, you would in fact under the rule of law have violated your oath.

If, on the other hand, if you are not satisfied beyond



a reasonable doubt that Benjamin DeChristoforo is guilty of murder as charged in this indictment, then you have a duty — and it is a serious duty — to find him not guilty.

Now, in the course of the Judge's charge to you — strike that.

The Court has already informed you that when a defendant comes in before the Court, he is presumed to be innocent. Now, you just accept that. This is a rule of law. You must start off with the premise that that man sitting in that dock is innocent until you are satisfied that he is guilty beyond a reasonable doubt.

You must also understand that when he is indicted, that that indictment is simply the accusation and is not, as the Court has already [862] very ably and competently informed you, it is not the slightest evidence of his guilt, and you must not — if you are going to follow the rule of law — consider it the slightest evidence of guilt.

Because, as the Court told you: this is a hearing where the defendant does not appear, where only the Government's witnesses appear, where they are not subject to the test of cross-examination, and where the results of it are only to accuse a person. And, you in your experience have known many, many instances where accusations have been made by seemingly responsible people that have turned out to be false.

So, that you are not to consider the indictment as being the slightest evidence of Benjamin DeChristoforo's guilt.

Now, then, you have the further proposition that at the trial of the case the Commonwealth has a burden, it has a duty, having accused somebody — just as if a neighbor accused you or some friend — having accused somebody, they [863] have got the burden and the duty and the obligation under the rule of law, under this system we live by, to prove each and every essential element of the accusation beyond a reasonable doubt.

Now, his Honor in charging you defined "a reasonable doubt." I was about to, but I think his language is far superior to the language I could use.

The Court said to all the panel: These defendants — and at that time there were two defendants — are entitled to have a verdict of not guilty rendered unless the Commonwealth proves to that degree of certainty that is expressed by the phrase "beyond a reasonable doubt", the existence of the state of facts that under the law constitutes the defendant's guilt of the crime charged. It is very important, therefore, that you get the correct ideas of the meaning of proof beyond a reasonable doubt. If jury men and jury women get the idea that proof to that degree of certainty is too easily made, then the words may mean little more than the probability of guilt, and [864] the defendants in criminal cases are likely to be convicted where the guilt is much in doubt.

And, the Court went on to say: And, if unreasonable doubt or mere possibility of innocence should be deemed enough to prevent conviction, practically every criminal would go free.

In short, what the Court was saying, and I will repeat some of his language in a moment, is that you can't prove, and no one expects the Commonwealth or anyone to prove something to a mathematical certainty, but they must prove that this defendant is guilty to a moral certainty.

And, the Court went on to say — and this is the last portion that I will read: A fact is proved beyond a reasonable doubt when it is proved to a moral certainty as distinguished from an absolute or mathematical certainty, when it is proved to that degree of certainty, ladies and gentlemen, that satisfies the judgment and conscience of you as reasonable men and women and leave in your mind as reasonable men and women [865] a settled conviction of the guilt of the defendant. But, if when all is said and

done there remains in the minds of you jurors any reasonable doubt of the existence of any fact which is essential to the guilt of these defendants on the particular charge or charges with which they are charged, specifically, first degree murder and on unlawfully carrying firearms, the defendant must have the benefit of it and cannot be found guilty upon the charge.

A reasonable doubt does not mean such doubt as may exist in the minds of a man who is earnestly seeking for doubt, but it means that doubt which may reasonably remain in the mind of the man who is earnestly seeking for the truth.

If you have a reasonable doubt you have less than a moral certainty of guilt, then, indeed, acquit them. If you have been convinced to a moral certainty at that stage in your mind's eye where you would act upon important affairs in your own lives, then, if unanimously reached by you, say, you reached [866] that stage, then you will find him guilty.

So, that under our system and under this rule of law that we live by you must be satisfied that the Commonwealth has proven to you every essential element to satisfy you to a moral certainty, to satisfy you to the same extent that if you were faced with the most important decisions of your life, that if you would hesitate before making that decision then you have a reasonable doubt.

Now, that is why it is important for you to understand what your duties and obligations are, and that is why it is important for you to know that this rule of law that we live by and live under in this country is so important, and that the bulwark of our democracy is this jury system which can and is the only body that can make a determination.

Now, let us see whether or not the Commonwealth here

has satisfied you beyond a reasonable doubt, that Benjamin A. DeChristoforo murdered Joseph Lanzi.

Now, in a general way the Commonwealth says in its indictment, as added to by its Bill of [867] Particulars, that Benjamin A. DeChristoforo personally fired four bullets into the body of Joseph Lanzi; or, in the alternative, if he didn't do that, then he acted in concert with some other people who fired four bullets into the body of Joseph Lanzi.

And, so what the Commonwealth has really done is taken the best of both lines and said: Well, if we are not able to prove to you that DeChristoforo personally fired the four shots, or any of the shots, into the body of Lanzi, then we are going to ask you to find that he acted in joint concert with some people where a plan was entered into to kill Lanzi, that DeChristoforo participated in that plan, that he assisted in the killing of Lanzi in some way, that he aided and abetted it in some way. So, if you don't find that he fired the shots in the body, then we say there was a plan and he was a party to it.

Now, let's see what they have done about establishing that.

First, let's eliminate the question of whether DeChristoforo fired any shots into the body of Joseph Lanzi. This jury which was [868] selected to try this case is an unusual jury, because it consists of many persons whose occupations and training and experiences are of a scientific or mathematical bent, people who are accustomed to evaluating evidence and facts in their particular occupation or profession.

Now, you have heard the physical evidence: There is an automobile in which four men are seated at the time that it is approached by the police car, by Officer Carr of Medford, and his associate.

There is no question but what DeChristoforo is sitting

in the left rear of the passenger side of the car. There is no question that Oreto is sitting to the right on the passenger side of the car. There is no question that Lanzi, the deceased, was sitting to the right of the driver's side of the car. And, I argue to you, that Mr. Gagliardi, or somebody else, was seated in the driver's side of the car at the driver's wheel. And, it is unimportant for the moment as to who it was.

You have heard that Gagliardi has pleaded [869] guilty, but it's unimportant at this moment.

All I am concerned about is to point out to you the physical impossibility that DeChristoforo pulled the trigger of any gun or fired a single shot into the body of his close friend, Joseph Lanzi.

[870] If you will recall, the physical evidence is that Lanzi was shot in the back of his head, just behind the right ear.

Let's take that shot first. The gun that shot the bullet that went into Lanzi's head was found where Oreto was sitting. It was found tucked in, I think, was the language or near the crease of the back of the passenger side of the car where Oreto was sitting. The bullet went from the right side of Lanzi's head to the left side of his head, that is, they found the bullet near the left eye.

So that the course of it was that way, coming from the right. Oreto was wearing gloves. He was identified by the police officers as wearing particular gloves. The blood on the gloves was the same group as the blood of Lanzi.

Oreto had blood on his clothing of the same group as Lanzi. There was blood to the right of Lanzi, towards the right-hand door away from the driver's side.

Now, the only way that DeChristoforo could possibly have shot — strike that for a moment.

[871] The testimony also was that the gun was probably held at a distance of about 24 inches from the head of

Lanzi. Therefore, it would have to be a shot aimed in substantially in this direction (indicating). Whether it's one inch or two out of the way in pointing out the specific entrance wound is not important. It was held back about 24 inches, because, if you remember, there was no powder wounds or nitrites on the head. The State ballistics expert or chemist — I don't recall which one — testified that the gun was probably held about 24 inches away. That's two feet.

Now, the only way that DeChristoforo could have fired that shot would have been to have gotten over beyond Oreto or sit in Oreto's lap and fire the shot, and I don't think anybody seriously contends, and I don't think that the Government, the Commonwealth, contends, and I doubt very much if you will hear Mr. Irwin argue that anyone but Oreto fired that shot.

But I may be wrong. And if I am wrong, then I want you to stop, when you go into your jury room, and ask the questions as to — Could [872] it have been anyone but Oreto who fired the shot? His gun. The blood on his glove. If you remember, I asked him whether or not the glove appeared to be in the clenched position, and he said: Yes. The blood spot was right up beyond the knuckle. There was blood on his clothing and there was blood in the front part of the car.

So that, obviously, it was Oreto. But even if it isn't obvious that it is Oreto, there is no evidence before you that would warrant you in finding that DeChristoforo fired that shot. The physical evidence just renders it impossible for you to come to that conclusion, I submit.

Now, then, you have three other shots into the body of Lanzi from a distance of two inches. You have heard testimony — it's uncontradicted — that the defendant is right-handed. You have heard testimony that the top of the back of the front seat, after there is somebody sitting

on it, is about 23 inches, I think the testimony was. You have heard testimony that the entrance wounds were somewhere around in this area (pointing), about two and a half [873] or three inches below the armpit.

Having in mind a body sitting in the front seat of an automobile, with a man sitting to his left, can you visualize the probabilities of somebody sitting in the back seat reaching over with his left hand — because, obviously, he couldn't do it with his right hand, couldn't get it around like that. And, of course, that would be absurd, because if DeChristoforo had any intention of killing Lanzi, there would be no point in reaching over and trying to get him this way with his left hand. He would shoot him through the back of the head, just the way Oreto shot Lanzi.

But to carry it to its end degree, can you visualize the physical impossibility of anyone reaching over like this, having in mind that there was testimony that it may have been that Lanzi had his arm up on the back of the front seat, because what was interesting was that there were no, there was no nitrites.

There were no burns on the arm or on the raincoat. So, obviously, his arm had to be somewhere moved away. [874] Now, I leave it to you to decide or to think about that as to whether or not his arm was still there when the testimony was that if it had been in that position, there would have been evidence of gunpowder or the nitrite or the like.

So I say to you: Can you possibly imagine the probability of DeChristoforo reaching over, probably over the arm which would even make it harder, but even if the arm wasn't over there, reaching over with his left hand and pulling this trigger three times in order to shoot Lanzi?

I submit to you that on the physical evidence, that's impossible.

So that I think it's fair to say that the Commonwealth hasn't demonstrated any evidence that would warrant you to even consider the question as to whether or not DeChristoforo actually pulled the trigger.

In short, I think that you would almost be compelled to come to the conclusion as reasonable people, that he wasn't the killer. He didn't pull the trigger that put a bullet [875] or bullets into the body of Lanzi.

So now we come to the next proposition that the Commonwealth gives you. They say, "All right. If you don't buy that, let's try this for size: This was a joint venture. This was a conspiracy to kill Joe Lanzi, and that DeChristoforo was a party to that conspiracy."

Well, the only evidence that the Commonwealth can show that at all affects Mr. DeChristoforo, and some of which undoubtedly have given you some problems in the course of your sitting here, is that you have testimony by the police officers that when DeChristoforo comes out of the automobile, he was asked his name and that he gave a false name; that he was asked for the name of the man in the front seat, Joe Lanzi, who was his close personal friend and whose name, of course, he knew; and that he gave a false name, the false name expected of him; that, thirdly, he was asked what happened to Lanzi, and that he said he was involved in a fight in Revere and that they were taking him to a hospital; and, fourthly, that he left the scene and then was [876] in hiding for 18 months.

Now, this is all the Commonwealth has here, by the way, and some of it is serious and requires serious attention.

When I say that it's serious, I think it's serious only because I think that it creates doubts in your mind rather than creates affirmative evidence against him.



But let's deal with those doubts for a while. As I have argued, we are under no obligation to prove innocence, but let's analyze this for the moment.

The Government says, "All right now. There is a conspiracy here." Now, as a matter of law, in a murder case the Commonwealth doesn't have to show a motive. But in engaging in a conspiracy to do something, engaging in a joint venture to do something, as reasonable people, you know people just don't engage in some conspiracy or joint venture unless there is a reason for it.

I mean, what was the reason to kill Joe Lanzi? Why? From all the evidence that you have heard, Joseph Lanzi was a close, dear, personal [877] friend of Butchie DeChristoforo.

Incidentally, there was a point when this Butch business was used, and, in all fairness, I am sure that Mr. Irwin didn't intend to have you think that the name, when he consistently said, "Butchie", was trying to make him out to be some East Side killer with a tough nickname. You have heard that he was known as Butchie as a baby, and Butchie as a child, and that's the way it was all through his life.

But in any event, what has been offered to you to get you to start thinking along the lines that Butch and others decided they ought to kill this fellow, this friend of theirs? Nothing, of course. There has been no evidence offered of any disputes here, of any fights, of any ill feeling, of any ill will.

In fact, the pictures that were put into evidence by the Commonwealth would show Lanzi and DeChristoforo at some wedding, show them standing side by side and apparently both ushers at a wedding.

Of course, they were close friends. That [878] was the testimony. There has been — nobody has contradicted

that. And if there was evidence that they weren't, you would have heard some.

So there isn't anything now that starts you off on a chain of thought that there must have been something, some ill will here, some motive of gaining power or wealth, something involving the domestic situation. Absolutely nothing.

All you know is that they are all in an automobile. Now, you have had evidence here that DeChristoforo worked as a page for the Senate of the Commonwealth of Massachusetts for about seven years; that his reputation was good or excellent or very good both for honesty and for nonviolence or for being a person not engaging in violence.

Now, when a defendant raises the question of good character, the Commonwealth has a right to introduce evidence of bad character. You have had no evidence before you of bad character. And although my Brother may argue to you, "Well, these are people who were friends of his and they grew up with him", well, who else knows about your reputation?

[879] You had a retired police officer who was on that beat for over 30-odd years. Would he have any motive to come in here and tell you that this boy was a boy who was not a violent boy?

So you have a boy who worked for the Commonwealth of Massachusetts and then goes to work at this place called The Attic. I don't know anything about The Attic, and there has been no evidence about The Attic except that some young lady who is a secretary at the Harvard Graduate School attended there.

Now, whether this makes it reputable or not, I don't know. For all I know, it is the most reputable place in the world.

But the fact is, he worked there as a manager.

The testimony from Dello Russo was that he worked there, taking care of the place, seeing to it that none of the liquor laws were broken; that up to 2:30 he would usher people out and the like. He was a workingman. It is a stormy, rainy night, and he winds up [880] in an automobile headed for the same direction that he lived in.

Now, you have heard testimony that he lived in Stoneham, and you have heard testimony that the car was stopped or found by the police officers on Fifth Street in Medford. You can draw upon your own knowledge of this area as to how far Medford is from Stoneham. You can use your own judgment about that.

I submit to you that you would have a right to draw the inference that all he was in there for was to get a ride home, because there is no evidence that he was in there for any other purpose.

So there is no evidence for you of any conspiracy here, of any agreement to do anything. Well, my Brother will argue: "That is so. Conspirators work in the dark." That is true. Conspirators don't stand out in the public and say, "We are going to conspire to overthrow the Government" or "we are going to conspire to rob a bank." They do it privately. That's so.

But the burden is on the Commonwealth to [881] show a conspiracy. Now, since they can't show it by oral statements, the next step is to show it by the acts and conduct of the parties.

Well, what is there in the testimony here that shows that the defendant DeChristoforo did this much to foster, to aid, to abet the killing of his close friend, Joe Lanzi? Nothing. There is no evidence here.

So it comes down to this, it comes down to the testimony of the police officers. Well, Officer Carr told you that at seven o'clock in the morning he sat down, together with his partner, and he wrote up a report of precisely what

took place as to his best memory; that he wrote it without any intention of withholding anything; that he didn't intend to mislead anybody; that it was intended for his superior officers.

This was a murder case, a serious case. On cross-examination, if you recall, he testified that in his report, written three hours after this incident, he said that the men got out of [882] the car; he asked the taller of the two men — no. He asked the men for identification. They said they had none. He asked them where they were from and they said Boston. And the taller of the two men then left, saying he was going over or asking to go over to join Carmen.

Now, that's in their report. Later in that report there is apparently statements which now the Commonwealth would have you believe took place before the defendant left. The police officer testifies that before he left, he spent a couple of seconds talking to him over there, and then he enlarged it to a few seconds.

Well, let's assume that it was a few seconds. I ask you, Mr. Foreman, lady and gentlemen of this jury, to time how long it would take to stand and talk to a man, and even if you rushed your words and said to him, "Do you have any identification?" "No." "Where are you from?" "Boston." "What is your name?" And he gives you a name. "Who is the man in the front seat?", and he gives a name. "What is the matter with him?", and he says, "There [883] was a fight in Revere and we are taking him to the hospital."

Do you say that only takes two or three seconds? I submit to you, Mr. Foreman, and members of the jury, that that report was accurate; that the police officers were not attempting to mislead anybody at that time and aren't attempting to mislead you now.

But memory plays peculiar tricks, because in his testi-

mony in the District Court Mr. Carr, the police officer, admitted that he said that he testified under oath there that he had asked Oreto who the man was in the front seat was, and that Oreto had said that it was Johnny — whatever the name is.

Now, I say to you, Mr. Foreman, lady and gentlemen of the jury, that Mr. Irwin will argue to you that these were false statements that were made by the defendant and, therefore, they are admissions and, therefore, you should construe them as evidence that Mr. DeChristoforo engaged in a conspiracy to kill his friend, Joe Lanzi, and that he aided and abetted the others, even though there is no evidence of it.

[884] I say to you, Mr. Foreman, and members of the jury, that you are faced with the most serious decision of your lives. You are faced with a question of finding this man either guilty or innocent of murder, and I ask you whether you would hesitate before you would say, "Well, I must buy this story of this police officer completely. I am convinced beyond a reasonable doubt that in the two or three seconds, that he talked to DeChristoforo", despite the fact that in the District Court he testified differently, despite the fact that in his handwritten statement it appears that DeChristoforo had left before any of these questions were asked. "I am convinced beyond a reasonable doubt to a point of moral certainty, where I must find that man guilty of murder."

I submit to you that there must be a reasonable doubt. I submit to you, Foreman, and members of the jury, that you cannot make this serious decision of finding him guilty to a moral certainty based upon that.

Now, what else is there? He fled. Well, [885] he didn't flee from the scene, because I submit to you that the facts are that he did give a name to the police officers.

It is interesting that they can't remember even remotely

what name he gave, but that they know that it wasn't the name of "DeChristoforo".

Well, of course, if you can't remember what name it is, I don't know how you could be so certain that it wasn't "Benjamin DeChristoforo".

I introduced Exhibit 14, and you are going to take this exhibit into your jury room with you. I point out to you that if that isn't a "B", a capital "B", or what appears to be a capital "B" written down there, then it's as close to it as one can find.

I submit to you that when Officer Brady wrote down Rego and the registration of the car, Hertz, and John Simone, and then a capital "B", that he was making notations which later on became of peculiar significance to him and to Officer Carr.

Why wouldn't they put in their report, [886] why wouldn't they put in their report that Frank Oreto gave a false name? Why wouldn't they put in their report that Benjamin DeChristoforo gave a name that they couldn't recall? Why wouldn't they put in their report, in a murder case, in a serious, serious matter, why wouldn't they put in their report that it was DeChristoforo who said that the man in front is John Simone? Why would Carr testify differently in the District Court?

I submit that there is at least a reasonable doubt. There is enough here to give you people, as honest, concerned citizens, enough of a problem here to say to yourself, "We can't be satisfied to a moral certainty that this is so. We think that the police are mistaken to some extent here. We think the police did an excellent job to the extent that they did, but we think they're mistaken about this detail." [887] As a consequence, I urge you with respect to this question of flight to consider that they asked him, that DeChristoforo said to him, "Is it all right if I go and join" or, "Can I go and join Carmen," and that they

must have said, yes, to him and let him and let him go.

And if you recall, they said they didn't tell him to come back, he wasn't under arrest, they didn't suspect him of anything, had no reason to hold him. So he wasn't fleeing from any charge or arrest or anything. And although it will be argued to you that flight is consciousness of guilt, I argue to you that not all flight is consciousness of guilt. Innocent people flee from situations out of fear for many many reasons.

And I must at this time point out to you, you may say to yourselves and if you do, it is an improper question — why didn't he take the stand? You dare not ask yourself that question. I submit to you in all sincerity: You dare not ask yourselves that question, because our constitution and our form of Government, as the Judge has already instructed you, and [888] will further instruct you, so, you must not even consider that. There may be any number of reasons for it, but just as there may have been any number of reasons why that man ran away from that place. There was a vicious killing of his friend, and who is to say that he wouldn't be next. And I submit to you, Mr. Foreman and members of the jury, he didn't go out and hide out with hoodlums, he didn't go out and hide out with racketeers, he went to his grandmother's house, and he stayed in his grandmother's house and he stayed there — and I submit you have a right to draw inferences that he stayed there out of fear, not out of fear of prosecution, but out of fear for other causes.

I submit to you, Mr. Foreman and members of the jury, that there is a very minute degree of negative evidence here, and that is, argument that my Brother will make, that he lied; the argument that he will make that he fled. I submit to you that that isn't enough to warrant you to say: I am satisfied beyond a reasonable doubt that this man is guilty of murder.

[889] And I ask you, Mr. Foreman and members of the jury, two days before Law Day to make certain that you adopt the rule of law, that you follow it implicitly in every instance, that you do not take into consideration his failure to testify, that you do not take into consideration conjecture and surmise and say, well maybe it was so, because there may well be many many other reasons which are equally consistent with innocence.

And so I submit to you, Mr. Foreman and members of the jury, with respect to the indictment of murder that you find him not guilty.

I will only spend two minutes on the indictment on the guns. He didn't own the car, he didn't drive the car. He had no gloves on, according to the testimony. His prints weren't on that derringer that was in the car. He is not known as a killer. He is not known as a vicious person. As to where that came from, it is pure conjecture. But he didn't have control over it or possession over it. If he did, there would be some evidence about it here. There was no evidence tracing ownership to him, registration to him. Nobody has ever testified [890] they ever saw him with a gun. Nobody has ever testified he is that type of a person. And I submit to you to find him guilty of that would be based upon pure conjecture and surmise, and I beg of you do not engage in conjecture and surmise.

If you are going to find him guilty, find him guilty only when you are satisfied to a moral certainty, you are certain to a moral degree that if this was the most important decision you had to make for yourselves that you would make it. But if there is a doubt in your mind about that, and I believe there is, I represent and argue to you there is, I ask you to find him not guilty.

The Court: We will have a very short recess before the District Attorney argues — three to four minutes.

(Brief recess at 3:40.)



(The Court came in 3:50 p.m.)

(Defendant DeChristoforo is present.)

The Court: Mr. District Attorney, you may argue.

Mr. Irwin: May it please the Court, [891] Mr. Smith, Mr. Foreman, Madam Juror and gentlemen of the jury. Let me preface my argument by saying that first of all I am aware that what I say really is an argument because the word "argument" presupposes that I am prejudiced to the cause that I represent, which of course I am. I think that the very nature of this system being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it.

I want you to be aware also that I understand completely that my argument is in no way evidence, all it is an attempt, I suppose, to point out to you those things that I think are important in the case with reference to our responsibility and the burden of proof.

And I realize that my closing argument should be in no way considered by you as any evidence in the case, and I am sure that you won't consider it as that; as I am sure that my opening statement to you is in no way evidence in the case and won't be considered [892] by you as evidence.

I think the important thing for me to say to you right now with reference to the opening I made to you, with reference to what we were going to prove: I hope that if there was anything in that opening that I said to you that we did not prove, that you will disregard what I said about it and only make your decision on the evidence that we presented to you. I represent to you that whatever I said in the opening I honestly and honorably intended to prove at the time, and I suggest to you that for the most part we have done that without any fear of contradiction.

Let me say by way of getting into my argument that I am aware of what our burdens are in the courtroom, what the Commonwealth's burdens are, what our responsibilities are, and I am aware of the fact that because DeChristoforo has been indicted for the murder and arrested is no evidence of his guilt and I don't ask you to regard it as such. As a matter of fact, you can't. And I realize that our burden is to prove to you beyond any [893] reasonable doubt his guilt.

The only thing I want to point out to you is this, at the beginning of my argument, that I will let the Judge instruct you on the law as far as reasonable doubt is concerned, as far as inferences, as far as burdens of proof, as far as anything else that has to do with the law is concerned. The Judge has presided at this trial, Judge Sullivan, and is fully able and thoroughly competent enough to tell you what the law is.

The only thing I am going to ask you to do is, when you go into that jury room, please bear in mind this: That when you sit here on the jury, on this particular case, you are more than people who can divorce themselves from the situation and say, look, we are sort of like umpires and we sit back here and decide who wins and who loses; because actually, you people are the winners and the losers when all is said and done — not me. If we lose I go on to the next case; if Mr. Smith loses, he goes on to the next case. But the people of this Commonwealth have a right to expect [894] that you people sitting here are their trustees; you people are the ones that have made these laws about murder, or, our fathers before us, or our families before us, they legislated these things — not me. And we have a sworn responsibility, it seems to me, to sit here in this courtroom now and say to ourselves: We are faced here in our judgment with one of

the most savage killings that any jury could ever see anywhere under any circumstances.

And let me say something to you, too, about motive in a murder case. I said in my opening, and I repeat again, the defense seems to make some big issue of motive in this case in an attempt, I suppose, to have the jury feel, regardless of what instructions might be given by the Court that an absence of motive in a killing is something that is a detriment to the Commonwealth's case, and therefore, you should sort of equate that to reasonable doubt and the acquit him.

I said to you at the very beginning, if you recall my words in the opening, that the Commonwealth in this type of a killing cannot [895] show you what the motive was. And if we reason together for a while along that line, I think we can conclude why: it is the most cold-blooded, the most sinister, the most clandestine murders that are incapable of showing a motive; you can't do it. Why do three people get together and decide to blast another man into oblivion? Sure, if they have a fight you could put evidence of that on that somebody had seen him, Mr. Lanzi, had a fight with DeChristoforo, or Gagliardi, or one of them, and he could get up and say: Two days before the murder they had a fight and supposed he gave one of them a bad deal. Obviously, at that particular point you have a motive for killing him. And then you have to weigh, I suppose, whether or not the previous beating justified a finding of second-degree murder, because there was something other than deliberate premeditation, there was anger, passion.

This isn't a killing of anger and passion. You people are sitting on this jury because as Mr. Smith pointed out to you, I let you sit, he let you sit. Why? The Court let you come here to be selected as jurors, because you are [896] reasonable, intelligent decent people. But beyond

that, we hope that you bring to your jury service something just a little bit more, something just a little bit more than your integrity, of course, which we expect you have, we hope you bring with you, common sense — common sense. Your everyday experiences. These are the important things.

[897] They try to make some mystery out of the fact of this particular killing. So, let's talk about the killing for a minute, and let's talk about the facts that are established and involved. And, let's talk about reasonable doubt.

Let's start out by saying the three of us, DeChristoforo, Gagliardi, and Frank Oreto, — and again in my words — for motives best known to themselves, have decided to deliberately with premeditation and with malice aforethought to murder Joseph Lanzi.

Let's start with that as a basis. And, it seems to me that that's a reasonable basis to assert, based on the evidence that you have heard. What do we do in furtherance of that preparation? We first of all decide that we will kill him in an automobile. We secondly decide that the way to do that is to lure him in some way into the automobile. That perhaps the best way would be through a friend, Mr. DeChristoforo, who is known very well to Mr. Lanzi. And, we also [898] decide that we have to do this in a clandestine way; you don't think that they were looking for witnesses. Obviously not. You don't think that they were going to leave that body in that car.

I ask you not to draw that impression. That body was obviously going to be disposed of and it wasn't going to be left in that automobile after it was shot.

But, what do you do? You take a night, and an early morning hour. You take a night when it's pouring rain, when there is apt to be no traffic at 4:00 a.m. on the streets.

And, you then take him, as I say, for a ride. You put him into the front seat; you arm everybody with a gun.

And, do you have any doubt in your minds now that Mr. DeChristoforo had that Rohm derringer that night — that Rohm derringer pistol? It was right in front of his feet in the position where he got out of that car.

The Commonwealth's position is, quite obvious, that this man, DeChristoforo, was in [899] that car with these people in a concerted action, in a joint effort to kill Joseph Lanzi.

We don't say that he shot him, we say that, in our answers, he shot him, himself, or with others — in our answers to specifications — because that is the legal significance of it. It's the equivalent — and let me point this out: when you are talking in terms of concerted action, it's the obvious equivalent of a person who is charged with armed robbery — and I think all of you, your experience is enough to conclude this, you know and I know and everybody else knows that if you are the driver of a car that's used in holding up a bank, although you never walk into the bank, although you never hold a gun in your hand, you are guilty of armed robbery if you are the driver of that car, because you are in a position to aid and abet the people who are actually in there with the gun on the teller.

That's the theory of the Government's case in the case of Mr. DeChristoforo — quite obvious.

I don't contest the fact that the evidence [900] points to the fact — I think I conceded it — I think the whole thrust of the Government's case was that Gagliardi shot him three times here, and Oreto shot him in the back of the head, and our friend, DeChristoforo, had a cocked Rohm derringer ready to administer another shot if that became necessary.

Is there any doubt about that in your minds? I fail to

see how there possibly could be any doubt about that.

What do they suggest to you with reference to DeChristoforo's position in the car? You are supposed to somehow gather that — and this is what I think they are suggesting — you are supposed to somehow gather that Gagliardi and Frank Oreto decided they were going to kill him. Now, there is not much question about elaborate preparation as far as they are concerned. Right? Rent a car; again, the late night, the early morning hours; Oreto was wearing gloves, gloves with a V-cut out of the back so they can be easily snapped on and off. Oreto is equipped with gloves. They are all equipped with guns. [901] Gagliardi obviously had that Richardson that he carried away and buried in the back yard on 9 Fourth Street in the back yard. I don't think there is any doubt about that. And, yet, nobody saw him do it. But, the fact is that he did it. You can say that with all moral certainty that he did do that.

And, as he backed across the street away from there, I think you can draw an awesome inference with reference to that situation with reference to Gagliardi.

But, let's get back to DeChristoforo. DeChristoforo, through his counsel, wants you to believe now, or some way conjecture up in your minds, — talk about conjecture or surmise — they want you to believe all of a sudden these two people had some sort of fantastic plan to murder Lanzi, and then just incidentally invited him along on a ride home to Stoneham. That's what he said.

And, I don't think that's unfair comment on the argument that was made to you people. That's what he is inferring quite clearly: that [902] DeChristoforo just happened to be in this car going home. So, at that point we have to conclude that Frank Oreto, I suppose, was carrying two guns, or Gagliardi was carrying two guns. You and I know that's a myth. That is, without being overly

emotional about it, that is positively absurd. Is it not?

Then, to compound it, he says: How do you know why he ran away that night; he was probably in fear of his life.

Right. That Butch DeChristoforo was afraid. He just happened to be going home, to get a ride home by two people who planned to kill his good friend who lived in Boston — and what Lanzi was going to Stoneham for is beyond me. Have you asked yourselves that? What Frank Oreto was going to Stoneham for is beyond me. I don't know if you asked yourselves that.

But, in any event, apparently DeChristoforo found himself in this situation where he was sitting in the car, and these people shot to death Joseph Lanzi, and then the police car came upon the scene and he got out, and he was still afraid, and he didn't have anything to do with [903] any guns, and he was scared of his life, and that's why he ran away and hid for a year and a half.

Mr. Foreman and madam juror, and gentlemen of the jury, if you believe that proposition, I suggest to you that is the most absurd and ridiculous proposition that you could ever believe in all your life.

He gets out of the car — let's suppose he was terrified — there is no evidence of that, you haven't heard any evidence to that. That's some suggestion that is made to you that you are supposed to adopt; and then you are supposed to carry that in the jury room and start to think about this thing and say, maybe he was afraid, and maybe we should acquit him.

The facts of the matter are, that when he steps out of the car he is right next to our friend, Mr. Oreto, who he is supposedly deathly afraid of. But, he knows, or should know, as he steps out of the car that Mr. Oreto has dumped his weapon on the seat, DeChristoforo dropped his [904] on the floor, and they get out this side of the car.

Now, at that point — and here is something that defense makes a great deal of — and this is supposed to be, as far as you are concerned, this is supposed to be a critical indictment of the testimony of Officer Carr, or somebody else, and you are supposed to say that he was trying to, I suppose, bury DeChristoforo in his testimony, or bury Oreto, or something like that. The fact of the matter is that the police officer testified to you that DeChristoforo is the one who told him who the fellow was in the front seat, and so on and so forth. We will get to that in a minute.

Let's talk about the situation where we have his hypothetical defendant out there with no gun on him now, no gun on Oreto. Gagliardi walked away, the fellow who shot him under the arm. He is gone. He is gone across the street. There are two uniformed Medford Police officers. All right. Oreto has no gun at this point. So, he is no threat to our friend, Mr. DeChristoforo.

[905] At that time does he say to the police: "Thank God you are here, they just shot my good friend, in the front seat." Of course he doesn't.

He says to you: he is terrified. Here are two police officers. He testifies to you — or, he tells you, I should say, that this is the man who is honorable and non violent, a wonderful outstanding citizen who worked as a Page in the State House and so on, who just happens to be the innocent victim of a whole set of circumstances, who would never hurt anybody in his life, who is terrified, and that's the reason he went away for a year and a half, who fled and hid and concealed himself. And, he did not say to the police officers at that point: "My God, they just shot my good friend, Joe Lanzi." No.

That's bad enough. What does he do beyond that? He says, "I'm going over and join Carmen" — the cold-



blooded murderer of his friend; he is going over and join him.

Now, doesn't that really, honestly, truthfully, once and for all and ever and ever irrevocably destroy that particular defense? [906] Just on cold analysis, doesn't that do it? Of course it does. Of course it does. Is it a premeditated murder? Can you think of anything any more?

Take that weapon in the jury room with you. Take both of them. Take both of them, and feel the trigger pull that's involved, and how much premeditation and deliberation it takes to put a gun into somebody's side.

Premeditation and deliberation, as the Court is going to tell you, is not something that runs over a period of time, it can be performed in an instant. Imagine the time that it takes to load that gun with five bullets. Imagine the time that it takes to load the .38 snub-nose with five bullets. Imagine the time that it takes to load the Rohm derringer with five bullets. They ask you to. They say: where did the guns come from? One gun is fifty years old; there is no record of it, you heard that testimony. The other gun was manufactured in Germany and ended up in South Carolina. No record of it there. The snub-nose revolver that [907] Oreto had was purchased in New Hampshire in January by somebody giving the name of Paul Santo, on a street non existent in Methuen.

You people here, again, you draw inferences from facts that are established. The inference I want you to draw is: these people are clever enough — is that they don't have guns that can ever be traced to them. You know that and I know it. Inferences from facts. It's a very simple thing when you stop and analyze it.

Let me put it this way to you. Let's suppose you wake up in the morning and you see the newspaper on the front doorstep. That's a fact that you establish in your own

mind. The inference that you can draw from that fact of course, is that the paperboy delivered it.

Now, that sounds like a real over-simplification. But, if you use that type of logic you can't go wrong in making a decision. Nobody saw the paperboy deliver it, you didn't see him, I didn't see him. Mr. Smith would say that that's circumstantial evidence, acquit him, that's reasonable doubt, maybe the milkman took the [908] paper from the paperboy and he threw it up on the steps, maybe a neighbor was going to school and said to the paperboy, you are tired, I'll throw it up on the steps.

If you start digging in terms of that as a reasonable doubt, then we should never have started this particular trial. We should never have started this particular trial.

Mr. Foreman and lady and gentlemen of the jury, as far as the possession of the guns is concerned in the car, his Honor will instruct you what the law is on that.

Let me tell you this: that the law only requires that if they knew the guns were in the car, any one of these defendants, if the guns were in a position where they could use them if they had to, if you can infer in any way that the guns were in a position where they had some sort of control over them, obviously, they are guilty of having a firearm under their control in the car whether they are out of the car or in the car.

[909] Because I think you could agree with me that that type of law would be thoroughly unenforceable if you had to show it was in his pocket in the car. All they have to do when the police approach is throw it on the floor and jump out of the car and say, "Here we are." That's why it becomes incumbent upon you people when you go to that jury room, to use your common sense. You listened, I'm sure long and hard to the arguments that have been advanced. But, I suggest to you, please, tomorrow morning

when you have a chance to listen to the instructions that his Honor will give you, please pay close attention.

[910] I am sure that you will find that you will have no trouble at all reaching a verdict in this case.

I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.

Mr. Smith: I object to that.

The Court: I don't think —

Mr. Smith: That is not fair argument.

The Court: No.

Mr. Smith: That isn't so.

Mr. Irwin: Let's talk about murder in the first degree. And then another thing that you are going to have to decide is the question of clemency. You are going to be instructed by the Judge that murder in the first degree is murder done with premeditation, deliberation, and with malice aforethought.

If that isn't the murder that we have here, then you will never see one, I suggest to you respectfully, that is premeditated and deliberate.

[911] And then when you find your verdict on that matter and on the gun matter, you are then to be asked to make a decision with reference to clemency in this case, whether or not you should recommend to the Court that this man be shown clemency or whether or not the death penalty should be imposed on him.

When you come to that point of your deliberations, I would assume that the answers that you gave here on the witness stand were honorable and honest answers with reference to the two questions along those lines. I have no reason to think that they weren't.

All of you or each of you said that you would be prepared to return a verdict of guilty on a crime punishable

by death if the evidence warranted and if it was proved to you beyond a reasonable doubt.

So when you start to decide whether or not Mr. De-Chirstoforo should be the proper subject matter of clemency, ask yourselves this — and this is the thing that we so often really lose place of in a murder case. Ask yourselves — what type of justice did they show to Joseph Lanzi? We don't know, really, much about Joseph [912] Lanzi.

In a murder case, you can't put into evidence the history of his whole life, who he grew up with, what his hopes and ambitions were, if any. But I think we can all conclude that what he might have been or what he was or what he wasn't, he undeniably had a right to live and he had a right to be free from murder and assassination and he has a right now or his family and the public has a right to expect that the people will deal severely with those people who perpetrated that murder.

Ask yourselves this: Did they allow — on the issue of clemency — did any of these people allow Joseph Lanzi to impanel a jury to decide whether or not he should die? Did they afford him the benefit of great counsel? Did they afford him the benefit of a stenographer to keep the records of his prosecution? Did they ask a jury to decide whether or not he should live or die? They did not. These people believe in capital punishment beyond any question of a doubt.

Mr. Foreman, Lady and gentlemen of the [913] jury, let me close by saying this to you: I respect each and every one of you for the attention you have given this case. You have given it in my judgment, remarkable attention.

I expect that you will return a verdict that is a reflection of the truth. I honestly and sincerely believe that there is no doubt in this case, none whatsoever.

I honestly and sincerely believe that you people feel that way. The only thing I ask you to do is this: I don't think that it's the function of a prosecutor to stand and bang on the jury rail. This isn't the Perry Mason Show. I am not Hamilton Berger. Mr. Smith is not Perry Mason. The true murderer is not sitting up back with the spectators, about to stand up. The true murderer is right there in that dock, Benjamin DeChristoforo.

Along with the other people who pumped those bullets into the body, he was there, prepared for any eventuality. He was there, prepared to assist them. He was their confederate. And he, more than anybody else, I think, is more reprehensible than the other two combined, [914] because this was the man who supposedly was the friend of Joseph Lanzi.

He is, in fact, a traitor to his friends. He is a murderer of his friend — pure and simple.

The Judge told you when you were first impaneled, I think, that the word, "verdict", means: to speak the truth.

The only thing I have ever asked any jury, as a prosecutor, is that you all have the courage to speak the truth, unafraid, please, unafraid.

Courage, determination — those are the assets that I ask of a jury.

In closing, I only ask you this: When your Foreman announces the verdict in this case, let it be a reflection of truth of what this case is, and then myself, society, Joe Lanzi, the entire world, can have no complaint with your verdict.

The word, "verdict", means: to speak the truth. In the privacy of your hearts and your consciences, you know beyond any doubt what the truth is in this case.

Please direct your Foreman to stand up and speak that truth for all of you.

Thank you very much.

. . .

[918]

## MORNING SESSION

(At 10 a.m., Wednesday, April 30, 1969, there was a lobby conference, during which the following transpired:)

Mr. Smith: If Your Honor please, I respectfully move for a mistrial on the grounds that the argument made by the Assistant District Attorney to the jury was so prejudicial and so unfair that it cannot be cured by instructions to the jury.

I have specific reference to the fact that in his argument, firstly, the District Attorney argued that there was a plot whereby DeChristoforo was to use his friendship with the deceased in order to get him into the vehicle for the purposes of having him killed and that he exploited his friendship in so doing.

There was no evidence from which this could be argued or from which any inference could be made.

Secondly, the District Attorney stated on Page 913 of the transcript that he honestly [919] and sincerely believed that there is no doubt in this case, none whatsoever.

I wish to point out to the Court that such a representation of personal belief is both improper and unethical. If a defendant's counsel argued to the jury that he personally believed in the innocence of the defendant, it would be subject to reprimand and would be improper argument.

Thirdly, on Page 910 of the transcript, the District Attorney stated in his argument: "I don't know what they" — referring to the defendant or his counsel — "want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder."

The record reflects that an objection was made by me.

No ruling was made by the Court from the record except that it could be inferred that the Court agreed with my contention that it was not a fair argument, although the Court's response to my statement, "That is not fair argument", appears to be: [920] "No."

I believe that the argument is so improper that cautionary instructions at this point cannot cure the prejudice that was created by that argument and, therefore, move for a mistrial.

The Court: All right. Now, in response to your statement, whether the record reflects this or not, my response to your — and I do not think that you made a formal objection.

Let us hear what the record says that you said on this occasion.

Mr. Smith: I stood up and said, "I object to that." And then the record reflects: "The Court: I don't think —" "Mr. Smith: That is not fair argument." "The Court: No." "Mr. Smith: That isn't so."

Then Mr. Irwin continued: "Let's talk about murder in the first degree."

The Court: All right. I think whether the record reflects it or not, that while this colloquy was taking place or at least I was attempting to say something but you were on your feet and talking.

Now, whether the record reflects it or not, [921] I said that it was improper argument. I said, "No. This is improper argument."

And thereupon, had there been a motion made by you at that time to have me instruct the jury along the lines of eliminating that from their minds, or something of that nature, I certainly would have complied, because I did consider at the time the argument was beyond the grounds of complete propriety, but certainly far from being grounds for a mistrial.

Now, before the charge, I am willing to give such instructions to the jury in this regard as you wish me to.

I would bring to your attention, however, — and this, I say, only to avoid prejudicing the defendant — that if I were to specifically point out on this occasion, which I am perfectly willing to do, if you ask me to, if I were to specifically point out the language, it would only be to emphasize it; and I do not think that that would be very helpful.

I, of course, plan to generally instruct the jury that arguments of counsel are not to be considered evidence whatsoever and that [922] they are only the expressions of the way that the various counsel, respective counsel, hope that the jury will view the evidence which they have heard, but they are not to consider arguments of counsel as evidence.

Now, if you think that's adequate instruction under the circumstances, that, then, is all I would give.

On the other hand, if you think in some way your client has been seriously prejudiced by this statement of Mr. Irwin, — and I cannot agree that he has been seriously prejudiced — I am perfectly willing to add to that general statement in my instructions anything that you wish me to add along these lines within reasonable limits.

But I will deny your motion for a mistrial.

Mr. Smith: Exception to the denial of the motion for mistrial.

The Court: Yes.

EXCEPTION No. 98

The Court: But I am still perfectly willing to have you request such instruction as you may think appropriate, with the one [923] caveat that I make: that sometimes these instructions only draw attention to a statement which, on the face of it, is made only in argument and is not evidence.



Mr. Smith: Well, Your Honor, first of all, I think that that's a burden that defense counsel has to bear and decide upon.

Now, without waiving my motion for a mistrial, I would now request, then, that Your Honor forcefully and specifically instruct the jury that the statement made by Mr. Irwin in his closing argument to the effect that the defendant was not really seeking a not guilty here, but —

The Court: Certainly not to be considered.

Mr. Smith: Well, I would like to have, further on that, that it was an improper statement; that from the beginning of the trial up to this point, the defendant has maintained his complete innocence and in no way has indicated that he is willing or that he is seeking to have the jury find him guilty of a lesser offense.

The Court: I will do so, and I suggest that you write it out and I will file it with the papers, what you write out, and I will so [924] instruct the jury.

Mr. Smith: I was going to add something, but I will do it in my writing. I will write it out.

The Court: Tell me what it is. I am not going to go much farther than that. That is about as far as I am going to go.

Mr. Smith: And that the defendant is still presumed to be innocent of all of the charges against him and that —

The Court: Those matters, of course, are handled in the charge proper. It is not necessary to go into it more than once.

Mr. Smith: Except that I think that it requires a specific charge.

The Court: I do not agree with that. I am perfectly willing to give you what you just requested, but to go into the presumption of innocence when quite obviously I am

going to talk at length about the presumption of innocence —

Mr. Smith: I understand that, Your Honor, but I think that this requires specific instructions.

The Court: You write out what you wish [925] and I will give those instructions some consideration, and I will grant what I wish to grant, and deny what I wish to deny, and you may save your rights on that.

Mr. Smith: All right, Your Honor.

Mr. Irwin: Judge, may I be heard for just a moment?

The Court: Sure.

Mr. Irwin: I would like to point out that with reference to arguments to the jury, that I, on behalf of the Commonwealth, first of all, take the position that the argument I made was in no way improper.

I also want to point out on the record that if we want to talk about propriety of arguments, it became apparent to me that Mr. Smith's argument, the entire thrust of his argument was that. He told the jury that this particular defendant fled that night because he was afraid. There is not one single iota of evidence in that direction.

He also told the jury that on this particular night, the reason the defendant was in that car was because he was getting a ride [926] home to Stoneham, and there's not one single iota of evidence, whether oral, written, or documentary, to show that whatsoever.

Mr. Smith: That just isn't so.

The Court: Where is the evidence that he was invited to take a ride or that he took a ride?

Mr. Smith: First of all, I said to the jury that flight may be the result of many reasons. It may be the result of innocent reasons, as well as reasons reflective of guilt; that they could find, in view of the atrocious murder, that he was in fear and that that's why he fled.

I did not say that he fled. I did not assert as a fact that he fled.

With respect to his taking a ride, I said that they could find or that I argued to them that there was no evidence of a conspiracy and that they could find that he was there being driven home.

I argued that Stoneham was a short distance from —

The Court: Did you examine the transcript? My own memory is somewhat different from this. [927] I have a distinct memory, it seems to me, that there was considerable discussion as to what — have you got today's transcript?

Mr. Smith: This is today's (pointing).

(The Court looked at document.)

Mr. Smith: Assuming all that to be so and assuming that I made an improper argument, which I do not admit I made, this does not warrant such an improper argument as was made by the prosecution.

If I made an improper argument, the time to have raised that was at the time I was making it, by objection.

The Court: Write out the instruction which you wish me to give and I will consider it.

Mr. Irwin: Before Mr. Smith leaves, Your Honor, could I say one thing else on the record?

The Court: Yes.

Mr. Irwin: I would like to point out to the Court that my understanding was — with all counsel in connection with this case, together with the Court — that I was in my argument to the jury, inasmuch as what happened, that is, your ruling on the FBI conversation that I made [928] reference to in my opening in the jury, you — and I think properly so — asked me to state to the jury that my opening was not evidence; that if, in fact, I represented anything in my opening that I didn't prove, that —

The Court: I have it from Mr. Smith, too, because he made some representations in his opening, too, that were not established by fact.

Mr. Irwin: Yes. But I would like to point out to the Court that it is my recollection that I did that pursuant to the request of the Court, and Mr. Smith did not.

I would also like to point out to the Court that in his opening to the jury he told this jury that he was going to have some evidence — and I think that this is very critical, because it's implanted in the minds of the jury now — he was going to have some evidence to show that DeChristoforo that night got a ride home from these people to Stoneham. There is not one single bit of evidence of that.

In addition to that, he also said that while he was in that car that night — and I [929] am using his words, quote, unquote, in his opening remarks to the jury, that there was an "incident", and those are his words, "an incident".

Mr. Smith: That is right.

Mr. Irwin: And I frankly, as honestly and as sincerely as I can, respectfully recommend to the this Court that there was not one single bit of evidence along those lines; that the only evidence the defense for Mr. DeChristoforo produced in this case was a lot of people whom they paraded to that witness stand, who talked about his reputation 10 or 15 years ago for honesty and nonviolence, and not one single bit of evidence about the ride home in that car or what went on in the car.

So I respectfully suggest to the Court that if what we are going to have now is instructions about propriety or impropriety of counsel's arguments or opening statements, then I would assume that or ask the Court respectfully to charge the jury along those lines, too.

The Court: Well, you may make some suggestions, if you wish to, in writing, and [930] I will act on those.

Mr. Irwin: Fine.

The Court: I do not think that I would accept your statement that I should charge the jury, however, that Mr. Smith made certain specific statements in his opening which were never established by the evidence, which, of course, is the case.

Mr. Smith: That's so. But the "incident" that I was referring to and which Your Honor apparently understood that I was referring to was that the fellow got murdered in the car.

The Court: You made a statement that this man was invited — it seems to me that the substance of it was that he was invited to get a ride home. He lived five minutes away in Stoneham, my memory is, and that he was along for a joyride or ride home and knew nothing about this. How this is conceivable, I do not know, but this is what you said, and there was not one whit of evidence that I heard that had anything to do with any such situation as that.

Mr. Smith: That is digression from what [931] Mr. Irwin just said.

The Court: All I can do, gentlemen, to be fair with you, is this: You write out, both of you, what you want me to say, bearing in mind that I am not going to prejudice the cause of the Commonwealth any more than I would prejudice your cause, and I am not going to go overboard on these instructions and get too specific on these instructions.

I do think that the record should indicate, if it does not, — and perhaps it does — that you were perhaps shouting louder than I was speaking at the time, but I did say that this was improper argument.

If you had asked me to, I would have been glad to

mention this fact to the jury, that the statement by Mr. Irwin — in my view, at least — went beyond the bounds of complete propriety, but, on the other hand, far short of anything that would warrant this motion for a mistrial, as far as prejudicing the client.

There is certain amount of latitude in all arguments, as you well know, since you have taken advantage of it yourself.

. . .

[933] (The Court came in at 10:55 a.m., Wednesday, April 30, 1969.)

The Court: Good morning jurors.

Poll the jury.

(The jurors were polled and each answered to the calling of his name.)

(Defendant DeChristoforo is present.)

The Clerk: Benjamin A. DeChristoforo. At this particular time you have a right to make an unsworn statement to the jury, and you have the opportunity to do so.

Defendant DeChristoforo: Your Honor, members of the jury. My name is Benjamin Anthony DeChristoforo. I am 30 years of age. I am married. I am the father of a baby boy.

I have known Joseph Lanzi all of my life. Joseph Lanzi and I were very close and personal friends.

In April of 1967 I lived with my wife and my son in Stoneham.

April 17, 1967, I was at work. I had no way to get home. I asked Carmen Gagliardi if he was going to Medford would he drive me [934] home. He told me he wasn't, that he was going to eat, he was going with Frankie and with Joe. He asked me if I would care to join them. I told him no, it was late.

He said he would drive me home, and take them back in Town to eat.

On the way home, on Route 93 in Medford, an argument broke. I had no part of it. I couldn't stop it.

I saw Joseph Lanzi get shot. I threw myself on the floor, I was afraid. I begged them to stop. I remember somebody hitting me in the back; I thought I was shot. I was screaming.

I remember being pulled up by my hair onto the seat. I remember a gun being put in my face. I remember being threatened and my family being threatened. I remember they tried to push me out of the car. I told them I wouldn't say anything. Until this day I didn't even tell my lawyer this.

Later on, on Fifth Street in Medford, as the officers were approaching us, Carmen told me, "Remember what I said." He then got out of the car.

[935] When Officer Carr was approaching Frankie and I, Frankie told me, if I loved my wife, if I loved my kid, "stay cool and keep your mouth shut." He told me to let him do all the talking.

When Officer Carr ordered us out of the car, he asked me my name; I told him it was Benjamin DeChristoforo. I did not answer any other questions, I was too afraid to answer any other questions.

I asked him if I could leave to go over to Carmen's house. I didn't know where Carmen was. I knew he had a gun on him. I knew he was afraid. When the officer told me that I could leave, I walked to the sidewalk. I turned around, they weren't looking at me, and I started to run. I don't think I stopped running until I got to my home in Stoneham.

I woke up my wife. I told her to get some clothes ready, get the baby. I told her something happened, I didn't tell her what. She drove me in Town. I asked her to take me to my grandmother's house; she did. I told her to take

the baby and go up to my father's house. I have never left my grandmother's house until the FBI picked me up. [936] I wasn't hiding from the law. It was made perfectly clear to the FBI, to the Boston Police Department, to the Medford Police Department that I would have turned myself in but they had to come and get me, that I was afraid.

For the last two years I have been living with Joe's death in my mind and Frankie's words: Do I love my wife? — I love her; — do I love my son? — I love him, too.

\* \* \*

[937] (The Court charged the jury as follows:)

Now, Mr. Foreman, Madam and gentlemen of this jury. The defendant has availed himself of the right to address you; but what he has said to you is not at all evidence for your consideration.

The historical background of this testimony, if you will, is quite interesting. Until 1866, the defendant in any criminal case in this Commonwealth had no right in our Court to testify on his own behalf. This was based upon the theory, less than salutary theory, that the defendant had such a great interest in his case that what he said would be unworthy of belief.

Shortly before 1866, however, the practice was developed that the defendant would be allowed to make an unsworn address to the jury; and this is just what you have heard now from Mr. DeChristoforo. This practice has been carried on throughout the years since sometime before 1866.

It must be emphasized, that because the statement which you have heard is unsworn, and, therefore, is not subject to cross-examination, [938] because none of the rules of



evidence apply to any statement made by this or any defendant under these circumstances, it is of course not evidence for your consideration. That is to say, the statement made by Mr. DeChristoforo is not evidence for your consideration.

Now for the charge proper.

Let me begin this charge by saying to you, that, as I have said with regard to unsworn statments, not subject to cross-examination of the defendant, it is not evidence, nor are arguments of counsel nor the opening of counsel — whether it be the Assistant District Attorney in this case or whether it be Mr. Smith — It is not evidence for your consideration.

Openings of counsel made by either the District Attorney or Mr. Smith on behalf of his client are not evidence, but they are merely the statements by the District Attorney or by Mr. Smith, the defense counsel, for what they respectively hope to prove; and you the jury should not consider any portion of the opening statement — either of the prosecutor, or the opening statement of Mr. Smith for [939] the defendant — you should not consider any portion of these statements which was not re-enforced by evidence during the course of the trial. Any portion of those openings which was not re-enforced by evidence in the course of the trial, of course, you will put out of your mind.

The closing arguments, too, Madam and gentlemen of the jury the counsel very often become overzealous. Closing arguments are not evidence for your consideration. Closing arguments, Madam and gentlemen, are merely statements by the respective counsel as to how they hope you will view the evidence which you have heard.

Now in his closing, the District Attorney, I noted, made

a statement: "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney.

[940] Consider the case as though no such statement was made.

And the same instructions, of course, apply to any statements in argument which were made by Mr. Smith on behalf of the defendant, if any, you feel there be, statements which he made in his argument which were not supported by the evidence which you heard here during the trial of the case. In short, the opening statement of counsel or the arguments of counsel at the conclusion of the case are not evidence for your consideration.

. . . . .

[1010] Do counsel have anything further?

Mr. Smith: Yes.

(Conference at the bench as follows:)

Mr. Smith: I wish to take an exception to the Court's failure to give the requested specific instructions to the jury concerning the statements of the District Attorney in his closing.

And, in the alternative, I take an exception to the failure to specifically instruct the jury that the District Attorney's statement, which statement has been discussed with the Court and which is made a part of the record, in the proposed Request for Instructions.

Exception is to the refusal to specifically instruct the jury that those statements made by the District Attorney were improper and should be disregarded by them.

COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT

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[Title Omitted in Printing]

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DEFENDANT'S REQUEST FOR INSTRUCTIONS

In his closing argument to you, members of the jury, Mr. Irwin the assistant district attorney, stated with reference to the defense:

"I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope you find him guilty of something a little less than first-degree murder.

"(a) That statement was improper argument. There is no basis for that statement. The defendant has consistently maintained his innocence by virtue of his plea of not guilty as to any and all charges or accusations made against him.

"(b) As far as you are concerned the defendant is still presumed to be innocent of any and all charges before you.

"(c) You are to totally and completely eliminate from your minds any such suggestion or argument made by Mr. Erwin (sic), insofar as that is humanly possible and if you find that you cannot eliminate that from your consideration of the case then you are to inform the foreman of the fact.

"(d) I ask you now whether there is anyone on the jury who feels he cannot eliminate that from his deliberations and from his consideration of his decision in this case.

"(e) In again instruct you that you are to disregard that statement made by Mr. Erwin (sic) and

consider this case as though no such statement was made."

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COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

[Title Omitted in Printing]

CLAIM OF APPEAL

Now comes Benjamin A. DeChristoforo and, being aggrieved by certain opinions, rulings, directions, judgments, verdict and sentence, which were rendered against him in the trial of said indictment and in every other proceeding on said indictment heretofore filed, claims an appeal to the Supreme Judicial Court.

By his Attorney,

PAUL T. SMITH

DATED: May 12, 1969.

Filed May 13, 1969.

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COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

[Title Omitted in Printing]

MOTION FOR NEW TRIAL

Now comes the defendant Benjamin A. DeChristoforo and in accordance with General Laws Chapter 278 (Ter. Ed.) s. 29, as amended, moves that this Honorable Court grant a new trial on the grounds that justice may not have been done, and further moves for a new trial on the further grounds that the verdict was (a) against the evidence, (b) against the weight of the evidence, (c) against the law, (d) that the procedure in the matter of peremptory challenges of jurors was violative of Rule 48 of the Superior Court Rules, and (e) that the closing argument of the Commonwealth was so improper as to violate the defendant's rights to a fair trial and his rights to Due Process of Law in that the Commonwealth's argu-

ment contained not only improper suggestions, insinuations, assertions of personal knowledge but was also so highly prejudicial as to deprive the defendant of his fundamental rights under both the Massachusetts Constitution and of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

By his Attorney,

PAUL T. SMITH

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AFFIDAVIT

I, Paul T. Smith, hereby affirm and make affidavit that the facts upon which this Motion for New Trial is grounded are apparent upon the record, transcript and files.

I further make affidavit that I have mailed a copy of this Motion, together with the Affidavit herein attached, by mailing the same postage prepaid to John Droney, District Attorney for Middlesex County at his office, Middlesex County Courthouse, E. Cambridge, Massachusetts.

PAUL T. SMITH

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK: ss.

May 13, 1969

Then personally appeared the above-named Paul T. Smith and made oath that the foregoing is true to the best of his knowledge and belief,

Before me,

DOROTHY ROTH LaBOSSIERE

Notary Public

My commission expires. 11/7/70

Filed May 14, 1969.

1969, Nov. 24. After hearing, motion taken under advisement.

Dec. 2, 1969. After examination of affidavits and after hearing — the within Motion for New Trial is denied.

ROBERT SULLIVAN, J.S.C.

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## COMMONWEALTH OF MASSACHUSETTS

## SUPERIOR COURT

[Title Omitted in Printing]

## DEFENDANT'S ASSIGNMENT OF ERRORS

Defendant assigns each of the following errors:

\* \* \*

4. Refusal to declare a mistrial because of the prosecutor's closing argument, "I quite frankly think that they (defendant and his counsel) hope that you find him guilty of something less than first degree murder;" the refusal to instruct the jury in plain, unmistakable language that such an argument was grossly improper and that they must not consider that argument in their deliberations; and the denial of his motion for a new trial based thereon. Such an argument was not only grossly improper, but it was also highly prejudicial. Moreover, it was unlikely that even the strongest instructions could erase the prejudice. Certainly such an impropriety could not be cured by any pedestrian instruction.

Ex. No. 98

Tr. 913, 920-922.

Ex. No. 99

Tr. 1010-1011.

Unnumbered Exception Summary of the Record 54-55.

5. The refusal to declare a mistrial because of the prosecutor's closing argument, "I honestly and sincerely believe that there is no doubt (about defendant's guilt of first degree murder) . . . none whatsoever;" the refusal to instruct the jury in plain, unmistakable language that such an argument was grossly improper and that they must not consider that argument in their deliberations; and the denial of his motion for a new trial based thereon. Such an argument was not only grossly improper, but was also highly prejudicial. It was unlikely that even the strongest instruction could erase the prejudice. Certainly,

such an impropriety could not be cured by any pedestrian instruction.

Ex. 98

Tr. 913, 920-922.

Ex. 99

Tr. 1010-1011.

Unnumbered Exception Summary of the Record 54-55.

PAUL T. SMITH

MANUEL KATZ

Attorneys for Defendant

Filed May 26, 1970.

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT OF MASSACHUSETTS  
COMMONWEALTH

v.

BENJAMIN A. DE CHRISTOFORO

Argued Jan. 4, 1971

Decided Dec. 7, 1971

Manuel Katz, Boston, for defendant.

John F. Mee, Asst. Dist. Atty., for the Commonwealth.

Before TAURO, C. J., and CUTTER, SPIEGEL, REARDON,  
QUIRICO, BRAUCHER and HENNESSEY, JJ.

REARDON, Justice.

This is an appeal by the defendant under G.L. c. 278, §§ 33A-33G, from his conviction for first degree murder in the Superior Court. The jury, which unanimously recommended that the death penalty not be imposed, also found the defendant guilty of illegal possession of firearms. The case comes to us on a transcript of the proceedings below, a summary of the record, and the defendant's assignment of errors.

The following facts are undisputed. About 3:55 A.M. on April 18, 1967, a car in which the defendant and three others were riding was stopped in Medford by two police officers. Shortly thereafter the officers discovered that the

occupant of the right hand side of the front seat was dead, having been shot once in the right side of the head and three times in the left side of the chest. The officers also discovered an unfired derringer on the floor of the car behind the driver's seat, and a .38 special caliber Smith & Wesson revolver, which had been fired once, on the rear right hand seat. A pathologist later estimated that the deceased, identified as Joseph Lanzi, died in the car sometime between 3 and 4 A.M. from the wounds described above. The head wound had been inflicted by the Smith & Wesson revolver and the chest wounds by a Harrington & Richardson revolver which was discovered sometime afterward buried in the vicinity of where the car stopped. Before the officers' suspicions were aroused, however, both the defendant, who had been sitting behind the driver in the back seat, and the driver, one Carmen Gagliardi, had left the scene. The other occupant, Frank Oreto, was arrested by the officers after their discovery that the fourth man in the car was dead.

Indictments for murder in the first degree and illegal possession of firearms were returned against Gagliardi, Oreto, and the defendant. On October 26, 1967, Oreto, the only one in custody, pleaded guilty to second degree murder and the gun charges. The defendant, against whom an F.B.I. warrant for unlawful flight was lodged in April, 1967, was apprehended by the F.B.I. in November, 1968, at his grandmother's house, where he had been living continuously since the incident. Gagliardi and the defendant were brought to trial together but only the defendant's case went to the jury. At the conclusion of all the evidence Gagliardi pleaded guilty to second degree murder and the firearms charges, and his pleas were accepted.

The Commonwealth, conceding that it was the other two occupants of the car who fired the actual shots, relied on circumstantial evidence to connect De Christoforo in



a joint venture with them to kill Lanzi. Evidence was introduced through Officer Carr, one of the two policemen who stopped the car, that the defendant gave a false name when they asked his identity. He also allegedly told them that the man in the front seat, whom the officers at first thought was asleep, was named "Johnny Simeone," that he had been involved in a fight in Revere and that they were taking him to the hospital. The defendant's immediate flight from the authorities and subsequent concealment was cited by the prosecution as evidence of guilt.

In addition to efforts to impeach the testimony of Officer Carr, counsel for De Christoforo called only character witnesses and the defendant's grandmother. Although he stated in his opening address to the jury that he intended to prove that the defendant was in the car only because he was being given a ride home from "The Attic," a bar in which he worked, he introduced no evidence to support this theory. He repeated in his closing argument that there were many reasons consistent with innocence to explain the defendant's presence in the car, including his being given a ride home. Similarly, no evidence substantiated the suggestion in the opening that "certain pressures" other than consciousness of guilt explained the defendant's flight and concealment.

We treat with several issues raised by the defendant.

1. The defendant contends it was error to deny his motion to inspect the minutes of the testimony of Officer Carr before the grand jury. Two motions to inspect the grand jury minutes, one with respect to each indictment, were filed before trial and were denied at that time without prejudice to their renewal. During cross-examination of Officer Carr, the defendant renewed his motions with respect to Carr's grand jury testimony and moved in the alternative that the judge make an in camera

inspection of the minutes. The judge denied all the motions.

In a number of recent decisions we have held that a judge is not required to grant such motions unless the defendant establishes a "particularized need" to see the grand jury minutes involved. *Commonwealth v. Ladetto*, 349 Mass. 237, 244-245, 207 N.E.2d 536. *Commonwealth v. Doherty*, 353 Mass. 197, 209-210, 229 N.E.2d 267. *Commonwealth v. Carita*, 356 Mass. 132, 141-142, 249 N.E.2d 5. *Dennis v. United States*, 384 U.S. 855, 870, 86 S. Ct. 1840, 16 L.Ed.2d 973. The judge properly applied the rule laid down in these decisions in denying the defendant's motions. Although the defendant contended that in two respects the testimony given by Carr at the trial was inconsistent with prior statements made by him, in neither instance was the alleged prior inconsistent statement claimed to have been made as part of testimony before the grand jury. In one instance the defendant pointed out an inconsistency between Carr's testimony at the trial and his testimony at an earlier probable cause hearing in which Oreto was the defendant.<sup>1</sup> He made full use of this inconsistency in an attempt to impeach Carr's testimony at the trial. In the other instance the defendant claimed an inconsistency between Carr's police report, made shortly after the incident, and his testimony at the trial. As to the events involved in the testimony, Carr's testimony on this point was supported by the unchallenged testimony of Officer Brady who was with Carr when the events occurred. We conclude that there was no inconsistency between Carr's testimony and his report which he clarified at the trial. The defendant did not show that the grand jury minutes would cast further light as to

<sup>1</sup> At the trial Carr stated that the defendant told him the false story about the dead man in the car, whereas at the probable cause hearing he attributed the story to Oreto.

either of the alleged inconsistencies (compare *Commonwealth v. Gordon*, 356 Mass. 598, 602-603, 254 N.E.2d 901) or that the grand jury testimony might be in any other way inconsistent with Carr's testimony at trial. *Commonwealth v. Otero*, 356 Mass. 724, 252 N.E.2d 210. In these circumstances there was likewise no need shown for the trial judge to inspect the minutes in camera himself. *Commonwealth v. Cook*, 351 Mass. 231, 233, 218 N.E.2d 393. *Commonwealth v. Doherty*, 353 Mass. 197, 210, 229 N.E.2d 267.

The defendant urges that we review and reconsider our holdings in the recent cases cited above which require a showing of a "particularized need" before being permitted access to the grand jury testimony of a witness who becomes a witness at the trial of an indictment returned by the grand jury. We recognize the difficult burden which this rule places upon a defendant seeking to impeach such a witness on the basis of inconsistencies between his grand jury testimony and his trial testimony. It may be desirable that we give further consideration to this rule. However, it is not appropriate to do so on the limited record of the case before us.<sup>2</sup> Such a change, if any, might more appropriately be accomplished for pro-

<sup>2</sup> The defendant as the appealing party has the burden of presenting to this court a record on appeal which shows that he was prejudiced by an error committed by his trial court. *Commonwealth v. Klangos*, 326 Mass. 690, 691, 96 N.E.2d 176. The record before us contains no portion of the grand jury minutes or any other information concerning the testimony given by Carr before the grand jury. The minutes are not incorporated in the record in any way. There is nothing to indicate that the defendant availed himself of any of the several methods open to him of having the minutes produced in court for marking, identification and incorporation in the record in connection with his exceptions to the denial of his motions with respect to the minutes. We cannot speculate on what the minutes contain or on whether they contain anything which might have been helpful to the defendant. The defendant has not sustained the burden of furnishing us with a record showing that he was prejudiced by the judge's action on his motions to inspect the grand jury minutes and his alternative motion that the judge inspect the minutes in camera.

spective application by exercise of the rule making power of this court. In this particular case the defendant is not precluded from seeking relief by way of a motion for a new trial at the hearing on which he may, by proper action, compel the production of Officer Carr's grand jury testimony for determination by the trial judge whether such testimony was in any way inconsistent with his testimony at the trial. *Earl v. Commonwealth*, 356 Mass. 181, 248 N.E.2d 498.

2. The defendant moved for a mistrial at the conclusion of the prosecutor's closing argument because of certain remarks in that argument. He claims also that the judge's instructions to the jury did not adequately cure the prejudicial effect of these remarks.

The defendant is quite justified in objecting to certain portions of the prosecutor's closing argument. It was clearly improper for the prosecutor to state, "They [the defendant and his counsel] said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." It was further improper for the prosecutor to state at another point his personal belief of the guilt of the accused. *Am. Bar Assn. Canons of Professional Ethics*, Canon 15. *Commonwealth v. Mercier*, 257 Mass. 353, 376-377, 153 N.E. 834. *Commonwealth v. Cooper*, 264 Mass. 368, 374, 162 N.E. 733. *Greenberg v. United States*, 280 F.2d 472, 474-475 (1st Cir.). *Harris v. United States*, 131 U.S. App. D.C. 64, 402 F.2d 656, 658-659.

The prosecutor's argument as a whole, however, did not require a mistrial. The judge acted properly within his discretion in denying a mistrial and in relying on curative instructions to erase the error. *Commonwealth v. Bellino*, 320 Mass. 635, 644, 71 N.E.2d 411, and cases cited. The judge adequately guarded the defendant's rights in each instance.

Counsel immediately objected to the first statement cited above. Although the transcript at this point is not clear,<sup>3</sup> the judge was later at pains to point out that he recognized at the time that the argument was improper. The record suggests, as the judge said, that his statement to this effect was not heard over defence counsel's expostulation. In addition, the judge explicitly stated later that he would have given immediate instruction to the jury to disregard the comment if defence counsel had asked for one. No such motion was made. In the absence of a suitable request the defendant cannot now successfully argue that an immediate instruction to the jury was necessary to erase the prejudicial effect of the remark. We suggest, however, that in many instances it may be more effective for the judge to give immediate instructions.

After the closing arguments the judge declared his willingness to include in addition to his general charge on closing arguments of both counsel a specific reference to whatever remarks the defendant thought were unduly prejudicial. In adequate compliance with a written request for instructions about this first objectionable remark submitted by counsel for the defendant the judge specifically covered the subject in his charge. Although the language he used was less emphatic than that requested by the defendant, who took exception to it, it was sufficient to safeguard the defendant's rights. *Commonwealth v. Devlin*, 335 Mass. 555, 568-569, 141 N.E.2d 269. *Commonwealth v. Gordon*, 356 Mass. 598, 604, 254 N.E.2d 901.

Counsel for the defendant did not object at the time to the prosecutor's statement of his personal belief in the guilt of the accused. He did mention it, however, in his motion for a mistrial, and by implication at least requested

<sup>3</sup> The transcript shows that the judge was recorded as saying "No" in what we interpret as agreement with defence counsel's statement, "That is not fair argument."

a specific instruction on it. Nevertheless, his exceptions to the judge's charge were too vague to make clear to the judge that there was objection to the judge's refusal to allude to that comment in particular in accordance with a written request to this effect.<sup>4</sup> Compare *Commonwealth v. Cabot*, 241 Mass. 131, 151, 135 N.E. 465. In view, however, of our obligation in capital cases to examine the whole case (G.L. c. 278, § 33E), we have considered the effect of this comment in light of the entire proceedings (cf. *Patriarca v. United States*, 402 F.2d 314, 322 [1st Cir.]) and particularly in the light of the judge's general admonition that counsel in their closing arguments "very often become overzealous. Closing arguments are not evidence for your consideration." We feel this instruction was adequate. As the judge pointed out, reminding the jury of an improper remark, no matter what the purpose, might tend to emphasize it.

[5] The defence has contended here that the improper argument was aggravated in its effect because of the jury's knowledge that the codefendant had pleaded guilty. This premise is not valid, because the codefendant's guilty plea was in no way inconsistent with the defendant's presentation of his defence of the jury. Although the defendant did not testify, his attorney represented in his opening and closing statements to the jury that the defendant was in the murder automobile but was there innocently and was in no way involved with the killing. The jury,

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<sup>4</sup> Counsel for the defendant excepted "to the Court's failure to give the requested specific instructions to the jury concerning the statements of the District Attorney in his closing. And, in the alternative, I take an exception to the failure to specifically instruct the jury that the District Attorney's statement, which statement has been discussed with the Court and which is made a part of the record [to the effect that defence counsel hoped the jury would find the defendant guilty of a little less than first degree murder], in the proposed Request for Instructions. [sic] Exception is to the refusal to specifically instruct the jury that those statements made by the District Attorney were improper and should be disregarded by them."

upon learning of the guilty plea, then knew that at least one other occupant of the vehicle had admitted criminal responsibility for the murder. It is not logical to conclude that the jury would accept any implied argument of the prosecutor that, because one of the men whom the defendant blamed for the murder had pleaded guilty, the defendant was any less firm in his assertion that he himself was not guilty of any crime whatsoever.

The improper argument must also be viewed in relation to the weight of the evidence of the defendant's guilt. The case against the defendant was an extremely strong one. It is not probable that the jury drew from the argument the subtle inferences now suggested by the defence. In any event, the remarks of the prosecutor were insignificant and harmless as viewed in the context of the great weight of evidence of guilt.

3. Assignments of error based on the judge's failure to give requested instructions are without substance. Three requested instructions dealt with the inference of innocence which the jury must draw from evidence which is consistent with both guilt and innocence. Although they accurately stated relevant law, the judge was not required to instruct the jury in the terms urged by the defendant. He adequately covered the substance of the requested instructions. *Commonwealth v. Mannos*, 311 Mass. 94, 113, 40 N.E.2d 291. *Commonwealth v. Aronson*, 330 Mass. 453, 458, 115 N.E.2d 362. *Commonwealth v. Monahan*, 349 Mass. 139, 170-171, 207 N.E.2d 29. He instructed the jury fully and accurately on the presumption of innocence and the burden of proof which the Commonwealth must sustain. He specifically cautioned them not to base their decision on suspicion or conjecture and further instructed them on the proper treatment of circumstantial as opposed to direct evidence in assessing guilt.

A final requested instruction was to the effect that



"[f]light does not necessarily reflect feeling of guilt." The judge properly instructed that evidence of the defendant's actions on the scene, his flight, and later concealment, could be taken "as an admission of guilt." He cautioned them in addition, however, that "common fairness insists that before you draw an inference of guilt for the crime of killing, you should be satisfied that these acts or words were at least a part of the motive or cause of the consciousness of guilt which caused these acts or words to be spoken." The defendant could not require more. "Having given the jury correct rules for their guidance . . . [the judge] is not required to go further and discuss possible findings of fact upon which a defendant might be acquitted." *Commonwealth v. Greenberg*, 339 Mass. 557, 585, 160 N.E.2d 181, 199. *Commonwealth v. Payne*, 307 Mass. 56, 58, 29 N.E.2d 709. In addition, the possibility that the defendant's flight was prompted by fear rather than guilt had already been suggested in argument to the jury by defence counsel.

4. Four other alleged errors now argued were not raised in the assignment of errors. It is incumbent upon the defendants in capital cases, as in any other kind of case, to file adequate assignments of error according to the procedures provided in G.L. c. 278, §§ 33A-33G. Section 33E of that chapter does not affect the applicability of the other sections in capital cases but only empowers us to order a new trial "if satisfied" that because of error of law or of fact the verdict is a miscarriage of justice, or where because of newly discovered evidence or for some other reason justice requires a new trial." *Commonwealth v. Bellinò*, 320 Mass. 635, 646, 71 N.E.2d 411, 418. We deal briefly with three in these contentions. None of them demonstrates any injustice which would require corrective action by us under § 33E. (a) Four questions were put to a character witness for the de-



defendant on cross-examination. Two questions were excluded. The two questions allowed are not conceded by the Commonwealth to have been improper. Any error, however, was harmless because the questions whether the witness's opinion of the defendant would be detrimentally affected by certain assumed facts about him merely stated the prosecution's theory of the defendant's role in the murder, with which the jury were already familiar. In addition, the witness answered in the negative to both questions.

(b) The judge properly excluded clearly hearsay testimony by the defendant's grandmother about what the defendant said to her when he arrived at her house several hours after the murder.

(c) There is no merit to the contention that the procedure provided in G.L. c. 265, § 2, for having the jury determine in a single verdict both guilt and punishment for first degree murder violates the Fifth and Fourteenth Amendments to the United States Constitution. The United States Supreme Court has recently resolved this issue in *McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454, 28 L.Ed.2d 711, decided with *Crampton v. Ohio*, 402 U.S. 183, 208-220, 91 S. Ct. 1454, 28 L.Ed.2d 711, in which the court sustained the constitutionality of a similar Ohio statute.

5. The defendant's final argument stems from the denial of his motion for a new trial. The motion, as amended some six and one-half months after it was originally filed, was based on allegedly newly discovered evidence outlined in four affidavits. Three of these were to the effect that the defendant was in the car on the night of the murder because Gagliardi had offered him a ride home from "The Attic." One of the three, by the defendant's father, also contained an account of an incident which would suggest that the derringer found in the back

of the car belonged to Lanzi. That affidavit asserted also that defence witnesses who were to be called to testify to the substance of the affidavits were prevented from testifying at trial by a threatening telephone call made to the defendant's father during the trial. The fourth affidavit, by counsel for the defendant on behalf of a Medford police officer, stated the substance of a conversation with the defendant's father before the defendant was apprehended to the effect that the defendant was hiding only because he was frightened of Gagliardi.

If the evidence described in the affidavits had been offered at trial in admissible form and believed by the jury, this information might well have led to a different result. The opening statement for the defendant indicates that the defence did in fact intend to introduce such evidence. The evidence thus was hardly newly discovered, although the affidavits advance a reason why much of it was not offered at trial. The threatening telephone call, however, does not explain why neither the defendant's father, who stated in his affidavit that he pleaded with the others to testify despite the call, nor the Medford police officer was called to testify. Nor is there any explanation for the delay of over six and one-half months before defence counsel presented this information to the court. Much of the information stated in the affidavits was hearsay and would not have been admissible in that form in any event.

The motion for a new trial on the ground of newly discovered evidence was addressed to the sound discretion of the trial judge. *Commonwealth v. Dascalakis*, 246 Mass. 12, 32-33, 140 N.E. 470. *Commonwealth v. Sacco*, 255 Mass. 369, 449, 151 N.E. 839. *Commonwealth v. Devereaux*, 257 Mass. 391, 394-395, 153 N.E. 881. *Commonwealth v. Chin Kee*, 283 Mass. 248, 257, 186 N.E. 253. *Commonwealth v. Wallace*, 304 Mass. 680, 33 N.E.2d 972.

Commonwealth v. Sheppard, 313 Mass. 590, 611, 48 N.E.2d 630. Commonwealth v. Coggins, 324 Mass. 552, 555, 87 N.E.2d 200. Commonwealth v. Robertson, Mass.,\* 259 N.E. 2d 553. His disposition of it "is not to be reversed unless a survey of the whole case shows that his decision, unless reversed, will result in manifest injustice." "Even if the nature of the evidence is such as to justify a belief that if it had been introduced at the trial the result of the trial would have been different, the judge is not required to grant the motion." Sharpe, petitioner, 322 Mass. 441, 444-445, 77 N.E.2d 769, 771. Commonwealth v. Robertson, *supra*, at p. 860, 259 N.E.2d 553. The 1966 amendment (c. 301) of G.L. c. 278, § 29, to allow the granting of a new trial where it appears to the trial judge that "justice may not have been done" has not altered the nature of our review of his action. Commonwealth v. Stout, 356 Mass. 237, 242, 249 N.E.2d 12.

[15-17] The weight and import of the affidavits submitted were likewise for the trial judge's discretion. Commonwealth v. Heffernan, 350 Mass. 48, 53, 213 N.E.2d 399. He did not have to accept them as true even though they were undisputed. Commonwealth v. Sacco, 255 Mass. 369, 450, 151 N.E. 839. Commonwealth v. Millen, 290 Mass. 406, 410, 195 N.E. 541. Commonwealth v. Doyle, 323 Mass. 633, 637, 84 N.E.2d 20. Commonwealth v. Coggins, 324 Mass. 552, 557, 87 N.E.2d 200. In weighing the new evidence presented he was entitled to make use of his knowledge of what had taken place at the trial (Commonwealth v. Sacco, *supra*, 255 Mass. at 451, 151 N.E. at 839; Commonwealth v. Chin Kee, 283 Mass. 248, 257, 186 N.E. 253), and he was not required to give reasons for his action. Commonwealth v. Sacco, *supra*, 255 Mass. at 450, 151 N.E. at 839. Finally, there was no requirement that the judge hear oral testimony in support of the affidavits;

\* Mass. Adv. Sh. (1970) 857, 859.

he was free to choose the procedure by which he would consider the motion. *Commonwealth v. Millen, supra*, 290 Mass. at 410, 195 N.E. at 541. *Commonwealth v. Coggins, supra*, 324 Mass. at 556-557, 87 N.E.2d at 200. *Commonwealth v. Heffernan, supra*, 350 Mass. at 54, 213 N.E.2d at 399. In these circumstances the record does not disclose any abuse of discretion in the judge's denial of the motion, which followed oral argument by both sides and the submission of the four affidavits in support of the motion.

6. Acting under G.L. c. 278, § 33E, as amended through St. 1962, c. 453, we have carefully reviewed the evidence. We have done this particularly with a view to testing the defendant's contention unsupported by evidence and referred to principally in the defendant's unsworn statement to the jury that he was in a motor vehicle in the process of being driven home when he was caught up in a situation of murder in which he personally was not involved. Our review indicates that it was open to the jury to return the verdict which they did, and that justice does not require the entry of a verdict of a lesser degree of guilt than that returned by the jury or that there be a new trial.

Judgments affirmed.

TAURO, Chief Justice (dissenting).

After a careful review of the entire record I am unable to agree with the majority opinion that the defendant's constitutional right to a fair trial has been preserved. I will discuss several of the factors which, in combination, lead me to this decision.<sup>1</sup>

<sup>1</sup> I disagree also with the majority ruling concerning the defendant's right to inspect the grand jury minutes. I make no further comment on this issue except to express my concurrence with the viewpoint of Spiegel, J., in his dissenting opinion.

The defendant, over his objection, was tried jointly with a codefendant.<sup>2</sup> The codefendant pleaded guilty (in the absence of the jury) to murder in the second degree at the conclusion of the evidence. The trial then resumed with only the defendant De Christoforo present. The judge stated, "Mr. Foreman, madam and gentlemen of the jury. You will notice that the codefendant Gagliardi is not in the dock. He has pleaded 'guilty,' and his case has been disposed of. We will, therefore, go forward with the trial of the case of Commonwealth vs DeChristoforo. The arguments will be held at two o'clock this afternoon."

During the course of the prosecutor's closing arguments to the jury he made certain remarks which are conceded to have been improper.<sup>3</sup> An issue raised by these remarks is whether they were so prejudicial in nature in the circumstances of the case as to require a new trial. There are two subdivisions to this issue: 1. Should the judge have immediately instructed the jury at the time the remarks were made? 2. Were the instructions given by the judge to the jury during his general charge sufficient to overcome the prejudicial harm to the defendant? If

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<sup>2</sup> There was no abuse of discretion in the denial of the defendant's motion for a separate trial.

<sup>3</sup> The prosecutor: "I am sure you will have no trouble at all reaching a verdict in this case. I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you will find him guilty of something a little less than first-degree murder." Defendant's counsel: "I object to that." The judge: "I don't think—." Defendant's counsel: "That is not fair argument." The judge: "No." Defendant's counsel: "That isn't so." The prosecutor: "Let's talk about murder in the first degree."

At the hearing on the motion for a mistrial the judge maintained that irrespective of its absence in the official transcription, he had stated, at the time of the improper remarks, in response to the defendant's objection, "No. This is improper argument." However, this statement does not appear in the official transcript of the evidence. See G.L. c. 233, § 80. If the court stenographer did not hear the judge's statement it is reasonable to assume that the jury did not. Moreover, as it will be urged later, if these instructions were in fact given they were far from adequate.

there exists a reasonable doubt as to the resolution of these questions it must be resolved in favor of the defendant.

In accordance with our statutory authority and responsibilities we must examine improper remarks of the prosecution in the context of the entire case. G.L. c. 278, § 33E.

The jury should have been given explicit instructions that they were to draw no inference as to De Christoforo's innocence or guilt from the elimination of the codefendant from the case. Announcing to the jury merely that the codefendant had pleaded guilty, without more, had the probable effect of leading to surmise and speculation in its deliberation. In such circumstances failing to give explicit instructions diminished significantly the defendant's right to a fair and impartial verdict.

De Christoforo, left as the sole defendant, and without appropriate instruction to the jury, found himself in a precarious position. It was in this setting that the prosecutor made improper remarks in his closing argument to the jury.

As the Supreme Court of the United States has stated, the prosecuting attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed. 1314. See *Smith v. Com-*



monwealth, 331 Mass. 585, 591, 121 N.E.2d 707; *People v. Talle*, 111 Cal. App. 2d 650, 678-679, 245 P.2d 633.

It must be emphasized that the highly prejudicial nature of the prosecutor's statement to the jury can be fully assessed only in context with the fact the the jury already knew that the codefendant had pleaded guilty. The jury had received no clarifying instructions as to this turn of events. In the circumstances, the prosecutor's argument may have left an inference with the jury that both defendants had offered to plead guilty to a lesser charge than first degree murder, and that the district attorney had accepted the codefendant's offer but rejected De Christoforo's offer. Even if the defendant had offered to plead to a lesser offence, this fact would have been inadmissible. Indeed, its admission would constitute fatal error. See *Kercheval v. United States*, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 839; *State v. Abel*, 320 Mo. 445, 8 S.W.2d 55. In the present case, however, there is nothing to suggest that the defendant or his attorney had at any time negotiated for a guilty plea or conceded the defendant's guilt.

Furthermore, shortly after making the first improper statement, the prosecuting attorney compounded the original impropriety by stating his personal belief as to the guilt of the accused.<sup>4</sup> It is, of course, a well established rule that an attorney may not properly state his personal belief in argument to the jury. *Commonwealth v. Cooper*, 264 Mass. 368, 374, 162 N.E. 729. *Commonwealth v. Sherman*, 294 Mass. 379, 391, 2 N.E.2d 477. See *Betts v. Randle*, 236 Mass. 441, 444, 128 N.E. 790; *Doherty v. Levine*, 278 Mass. 418, 419, 180 N.E. 168. As the Court of Appeals for the First Circuit has stated, "To permit counsel to express his personal belief in the testimony (even if not phrased

<sup>4</sup> "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way."

so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing." *Greenberg v. United States*, 280 F.2d 472, 475 (1st Cir.). See *Harris v. United States*, 131 U.S. App. D.C. 105, 402 F.2d 656, 657-659; *Hall v. United States*, 419 F.2d 582, 586 (5th Cir.). The statement by the prosecutor of his personal belief in the defendant's guilt compounded the serious harm resulting from the prosecutor's earlier improper statement, for the statements taken together might lead to an inference that the prosecutor had personal knowledge of the defendant's guilt by reason of the defendant's unsuccessful attempt to plead to a lesser crime. The cumulative effect of the remarks of the prosecutor with no adequate and corrective instructions, coupled with the jury's knowledge without clarifying instructions that the codefendant had pleaded guilty at the close of the evidence, seriously prejudiced the defendant's right to a fair trial.

Moreover, the judge in his final instructions failed to correct the harmful effect of the improper argument. It is the rule of this Commonwealth that the jurors are generally expected to follow instructions to disregard matters withdrawn from their consideration. *Commonwealth v. Bellino*, 320 Mass. 635, 645, 71 N.E.2d 411. *Commonwealth v. Crehan*, 345 Mass. 609, 613, 188 N.E.2d 923. However, there have been persuasive opinions that correcting instructions cannot overcome serious prejudicial effect. What was stated by Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790, constitutes a practical and realistic appraisal of the situation. "The



naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." There are circumstances in which the prejudicial effect is of such proportions that it cannot be corrected by instructions to the jury.<sup>5</sup> In *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, F.27, 20 L.Ed.2d 476, the court stated: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Moreover, corrective instructions must be sufficiently strong to accomplish the purpose of counteracting the adverse effect of the prejudicial remarks or evidence. *Heina v. Broadway Fruit Mkt. Inc.* 304 Mass. 608, 611, 24 N.E.2d 510. *Commonwealth v. Crehan*, *infra*. See *London v. Bay State St. Ry.* 231 Mass. 480, 485-486, 121 N.E. 394; *Stricker v. Scott*, 283 Mass. 12, 14-15, 186 N.E. 45.

In the instant case, the judge did not instruct the jury at the time the improper argument was made nor did he call for an immediate retraction. See *Commonwealth v. Cabot*, 241 Mass. 131, 135 N.E. 465. In his final instructions to the jury the trial judge made the routine observation that arguments of counsel are not evidence: "Consider the case as though no such statement was made." In the circumstances of this case the instructions were far from sufficient to overcome the serious damage done. "It was the duty of the judge to emphasize the fact that the argument had been grossly improper; to point out in

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<sup>5</sup> Error was found in *Commonwealth v. Cabot*, 241 Mass. 131, 135 N.E. 465, (that defendant's defence was a technical one), and in *Commonwealth v. Domanski*, 332 Mass. 66, 69-70, 123 N.E.2d 368 (that an unfavorable inference should be drawn from the defendant's failure to call witnesses where there was no evidence that the defendant had witnesses he could call). *Worcester Telegram & Gazette, Inc. v. Commonwealth*, 354 Mass. 578, 238 N.E.2d 861. *Commonwealth v. Gordon*, 356 Mass. 598, 603-604, 254 N.E.2d 901.

plain, unmistakable language the particulars in which it was unwarranted and to instruct the jury to cast aside in their deliberations the improper considerations that had been presented to them, using such clear and cogent language as would correct the obviously harmful effect of the argument. This was not done." *Commonwealth v. Cabot*, 241 Mass. 131, 150-151, 135 N.E. 465, 472. *London v. Bay State St. Ry.* 231 Mass. 480, 486, 121 N.E. 394.

The majority opinion notes that if defence counsel had requested immediate instructions at the time of the improper remarks the judge would have given them and that "[i]n the absence of a suitable request the defendant cannot now successfully argue that an immediate instruction to the jury was necessary to erase the prejudicial effect of the remark." In a capital case where a man's life may be at stake, and in view of the requirements of G.L. c. 278, § 33E (as amended through St. 1962, c. 453), this view of the majority is untenable. The trial judge has the ultimate responsibility (as we have on review) of guaranteeing the defendant a fair trial. In the circumstances of this case it was the judge's obligation immediately, with clear and unmistakable language, to instruct the jury that the prosecutor's arguments were grossly improper. Moreover, he should have ordered their retraction by the prosecutor. Even though defence counsel may not have moved for immediate corrective instructions, his objections to the remarks were sufficient to require immediate action by the judge. The prosecutor's comments were so prejudicial in nature that the judge should have acted *sua sponte*. In the total circumstances of the case nothing less could have safeguarded the defendant's constitutional rights to a fair trial.

The remarks of the prosecution in this case were far more prejudicial than the newspaper publicity of the de-

fendant's criminal record in the *Crehan* case.<sup>6</sup> The prosecutor's argument in the instant case permitted or perhaps even suggested an inference that the defendant had conceded his guilt and was merely hoping for something a little less than a verdict of murder in the first degree. This diminished his chance for a fair trial to a far greater degree than would have the publication in a newspaper of his criminal background. Unlike a newspaper, the prosecutor ostensibly speaks with the authority of his office. The prosecutor's "personal status and his role as a spokesman for the government tend'ed] to give to what he . . . [said] the ring of authenticity . . . tend[ing] to import an implicit stamp of believability." *Hall v. United States*, 419 F.2d 582, 583-584 (5th Cir.). The prosecutor's remarks probably called for a mistrial. In any event the judge's failure to instruct the jury adequately and with sufficient force to eliminate the serious prejudice to the defendant constitutes fatal error. Moreover, the judge's routine final instructions to the jury were far from sufficient to correct the error. By then the defendant's position had so deteriorated that his chances for a fair deliberation of his fate by the jury were virtually eliminated.

For these reasons I believe that the defendant did not receive a fair trial. I would grant a new trial.

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<sup>6</sup> In *Commonwealth v. Crehan*, 345 Mass. 609, 188 N.E.2d 923, during the trial certain newspaper articles implied that each defendant had a criminal record. "On this assumption some action by the judge was required to overcome the possibility of prejudice. The judge recognized this and, rejecting the argument for a mistrial, decided that immediate instructions were not required and that a general caution in the charge would be adequate." This court further stated, "Postponing any instruction until the charge, however, risked an adverse effect in the interval." Judgments were reversed.

**SPIEGEL, Justice (dissenting).**

I am in complete accord with the Chief Justice's dissenting opinion. Nevertheless I feel impelled to also state my disagreement with the majority's adherence to the rule requiring the defendant to show a "particularized need" to inspect the grand jury minutes of the testimony of witnesses who testified before the grand jury and who subsequently testified at the trial.

1. The current rule imposes on the defendant a well-nigh intolerable burden, and is thus out of touch with the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States*, 384 U.S. 855, 870, 86 S. Ct. 1840, 1849, 16 L.Ed.2d 973. In the case at bar for instance, the majority hold that the defendant was not entitled to disclosure because he "did not show that the grand jury minutes would cast further light as to either of the alleged inconsistencies . . . or that the grand jury testimony might be in any other way inconsistent with Carr's testimony at trial." How could the defendant make such a showing, in the absence of an admission by the witness (see, e.g. *Commonwealth v. Carita*, 356 Mass. 132, 141-142, 249 N.E.2d 5), without first inspecting the minutes? It is a formidable task confronting a defendant to show a "particularized need," unless per-chance he is possessed of supernatural powers. In the case of *Jencks v. United States*, 353 U.S. 657, 667-668, 77 S. Ct. 1007, 1013, 1 L.Ed.2d 1103, involving a defendant's request for inspection of written reports of F.B.I. agents concerning events as to which they testified at trial, the court pointed out: "Requiring the accused first to show conflict between the reports and the testimony is actually do deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and

unless he admits conflict . . . the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."

This court in *Commonwealth v. Cook*, 351 Mass. 231, 233, 218 N.E.2d 393, citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S. Ct. 1237, 3 L.Ed.2d 1323, and *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L.Ed.2d 973, has said that our rule requiring a defendant to show a "particularized need" appears to be the same as the Federal rule. We should recognize, however, that many Federal Courts of Appeals have interpreted the *Dennis* case as implicitly repudiating the "particularized need" standard.<sup>1</sup> One court in the case of *Cargill v. United States*, 381 F.2d 849, 851-852 (10th Cir. 1967) has said relative to the opinion in the *Dennis* case: "The Court retains the requirement that 'particularized need' be shown in order that the secrecy may be lifted, but holds *in effect* that such need is shown when the defense states that it wishes to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility. Thus the Court as far as cross-examination is concerned has removed most, if not all, of the substance from the particularized need requirement, although it has retained the term. Under this opinion, it appears that the defense is entitled to the grand jury transcript of the witness's testimony when the jury's functions are ended, and when the request is made during

<sup>1</sup> Since the Supreme Court in the *Dennis* case based its decision upon its supervisory powers over the Federal District Courts and not upon a constitutional right of the accused, we are not compelled to follow it. *Connor v. Picard*, 308 F. Supp. 843, 846 (D. Mass. 1970). This case and other Federal cases noted in this dissent are cited not because they are controlling but because I believe that they represent a rule of reason.

the course of trial that it is necessary for the purpose of cross-examining such witness for the above mentioned purposes. The Supreme Court mentions and relies to some extent on the rationale of *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007, 1 L.Ed.2d 1103, on this point. The Court also states that ' . . . it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling consideration.' "

Three Courts of Appeals have held that once a government witness has testified at trial, the defendant has a right to examine his grand jury testimony on the subjects about which he testified at the trial, unless the government can show special circumstances exist justifying a protective order. *United States v. Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967). *United States v. Amabile*, 395 F.2d 47, 53 (7th Cir. 1968). *Harris v. United States*, 140 U.S. App. D.C. 21, 433 F.2d 1127, 1128-1129 (1970). The First Circuit Court, in *Schlinsky v. United States*, 379 F.2d 735, 740 (1st Cir. 1967), has said that, in the light of the *Dennis* opinion, "the requirement of 'particularized need' is very easily met. Here, as in [the] *Dennis* [case], it was for cross-examination." But cf. *Walsh v. United States*, 371 F.2d 436 (1st Cir. 1967).

The American Bar Association (Standards Relating to Discovery and Procedure Before Trial, § 2.1 [a] [iii], p. 13 [Approved Draft 1970]) has recommended that the prosecutor be required to disclose those portions of the grand jury minutes containing relevant testimony of persons whom he intends to call as witnesses at the trial. Several State statutes grant defendants similar rights of inspection in advance of trial. E.g. Cal. Penal Code §938.1; Iowa Code Ann., § 772.4; Ky. Rev. Stat., Rules of Criminal Procedure, Rule 5.16 (2); Minn. Stat. Ann., § 628.04; Okla. Stat. Ann., Tit. 22, § 340.



It is true that in certain instances it may be available to maintain grand jury secrecy in advance of trial to protect the safety of witnesses. (See, e.g. *Posey v. United States*, 416 F.2d 545 [5th Cir. 1969], the case involving the murder of three civil rights workers near Philadelphia, Mississippi, in June, 1964.) But as courts and commentators have often pointed out, once a witness has testified at trial, the reasons for preserving grand jury secrecy simply fade away. *Commonwealth v. Mead*, 12 Gray, 167, 170. *State v. Faux*, 9 Utah, 2d 350, 353, 345 P.2d 186. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405-406, 79 S. Ct. 1237, 3 L.Ed.2d 1323 (dissenting opinion). Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668, 674 (1962). Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 476-477 (1965). As Dean Wigmore (*Wigmore, Evidence* [McNaughton rev. 1961] § 2362, at p. 736) has said concerning the grand jury witness: "If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce." On the other hand, "if the grand jury testimony is inconsistent with the testimony given at trial, then fair play seems to dictate that the defendant be allowed use of the grand jury minutes for impeachment purposes, unless there is a compelling need for secrecy to protect individuals or in the aid of national security." *United States v. Barson*, 434 F.2d 127, 129-130 (5th Cir. 1970).

Our decisions holding to the "particularized need" standard are of comparatively recent origin. I do not, however, find this a persuasive reason to follow a rule which does not stand the light of logical analysis. The principal of *stare decisis* is not absolute because no court

is infallible. There should be no reluctance to overrule a decision which is wrong, either because it was not sound when originally promulgated or because subsequent events prove it to be wrong.<sup>2</sup>

Footnote 2 of the majority opinion indicates that if the defendant had included the grand jury minutes in the record on appeal, this court could have then determined whether the defendant had been prejudiced by the judge's action in denying the defendant the right to inspect them, or in refusing to read them himself "in camera." I do not believe that a trial judge or an appellate court should conclude that a defendant would not have been able to undermine a witness's credibility by use of the grand jury minutes. This should be the sole privilege of the defendant. "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made *only* by an advocate" (emphasis supplied). *Dennis v. United States*, 384 U.S. 855, 875, 86 S. Ct. 1840, 1851, 16 L.Ed.2d 973. This is vastly different from the situation where a question has been excluded in direct examination and an offer of proof is before this court. In such an instance, of course, this court could determine that the evidence contained in the offer of proof would not have benefited the defendant. In cross-examination using the grand jury minutes, we have no means of knowing just what questions counsel for the defendant might ask, or what the answers might be, or what benefit the defendant might derive therefrom.

<sup>2</sup> It may be argued that the impact of an abrupt reversal is lessened by an assertion that a court from a date in the future will no longer follow the rule originally enunciated. See, e.g., *Colby v. Carney Hosp.* 356 Mass. 527, 254 N.E.2d 407; *United States v. Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967); *United States v. Amabile*, 395 F.2d 47, 53 (7th Cir. 1968). Although I appreciate the validity of such a prospective holding in a civil case, I see no merit whatever in such a theory when a defendant's life or liberty is at stake.



I am of the firm opinion that we should hold that the Commonwealth, after a witness has testified at trial or at any preliminary or voir dire hearing, be required to turn over to the defendant the relevant portion of his grand jury testimony, unless the Commonwealth can demonstrate a compelling need to keep such testimony secret. *Disclosure* facilitates the fact finding process; *secrecy* only inhibits it.

2. Officer Carr testified that the defendant told a false story about the dead man in the car. The Commonwealth introduced this evidence to show consciousness of guilt. Cross-examination of the officer showed that he had previously testified at a probable cause hearing that it was Oreto who told this falsehood. Even if I were inclined to follow the rationale employed by the majority I would feel obliged to hold that the requisite "particularized need" was established and consequently would be unable to conclude that the judgment in this case should be affirmed. See *Commonwealth v. Carita*, 356 Mass. 132, 141-142, 249 N.E.2d 5; *Commonwealth v. Doherty*, 353 Mass. 197, 215-216, 229 N.E.2d 267 (dissenting opinion). Compare *Commonwealth v. Kiernan*, 348 Mass. 29, 36, 201 N.E.2d 504.

The Commonwealth should have no interest in convicting an accused on the basis of testimony which has not been as thoroughly impeached as the evidence permits. I see no basis for the apparent assumption by the majority, without having seen the grand jury minutes, that De Christoforo could not benefit from an examination of them because he had "made full use of . . . [an] inconsistency [at an earlier probable cause hearing] . . . to impeach Carr's testimony at the trial." In this area of disclosure of grand jury testimony, the Supreme Court of the United States has said: "There is no justification for relying upon 'assumption.'" *Dennis v. United States*,

384 U.S. 855, 874, 86 S. Ct. 1840, 1851, 16 L.Ed.2d 973.

In a similar situation, a Federal Court has held that "[i]nconsistent testimony on a crucial issue by the principal prosecution witness demonstrated 'a particularized need' as required by *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S. Ct. 1237, 3 L.Ed.2d 1323 ... to produce the pertinent grand jury minutes." *Harrell v. United States*, 115 U.S. App. D.C. 169, 317 F.2d 580, 581, fn. 5 (D.C. Cir. 1963). There the arresting officer had given several different versions of his seizure of narcotics from the defendant's taxicab. The judge refused to allow the defendant to examine the officer's grand jury testimony, or to do the same himself in camera, apparently on the theory that any possible material inconsistencies would be merely cumulative. The court quite rightly pointed out that "[n]ot having seen the grand jury testimony, the trial judge was in no position even to speculate on what effect its disclosure might have had on Hutcherson's credibility, with him or with the jury. We cannot assume that Hutcherson was so discredited by the disclosed inconsistencies that further discrediting was impossible." *Id.* at 581.

3. I make no pretence of determining the defendant's innocence or guilt. However, I am convinced that he did not receive a fair trial and thus I would reverse the judgment and set aside the verdict.

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS  
Number 0096-G M.C.

BENJAMIN A. DECHRISTOFORO  
PLAINTIFFS

v.

ROBERT H. DONNELLY  
DEFENDANTS

DOCKET ENTRIES

1972

- July 7 Petition for Writ of Habeas Corpus, FILED.
- 11 Order to Show Cause issued returnable 7/14/72.
- 14 Respondent's return, filed. c/s.
- 14 Respondent's motion to dismiss, filed. c/s.
- 26 File referred to Magistrate Davis for hearing.
- Aug. 11 Memo in support of Petition for Writ of Habeas Corpus, filed.
- 16 Respondent's motion for enlargement of time for filing of respondent's memo in opposition to the petition to and including August 22, 1972, filed. c/s.
- 28 DAVIS, MAGISTRATE Memorandum entered.
- 28 Return of Habeas Corpus with service made on Robert Donnelly on 7-12-72, filed.
- 31 Notice sent of scheduled hearing for Sept. 5, 1972 at 2:00 P.M. Counsel notified by phone and by letter.
- Sept. 5 GARRITY, J. After hearing on objections to recommendations of Magistrate, matter TUA.
- 8 GARRITY, J. Request re: Submission of a further memorandum — Request granted — Suggested

1972

- starting point — Connor V. Picard, D.Mass. 1970, 308 F. Supp. 843, 846-47.
- 15 Additional Memorandum in Support of Petition for Writ of Habeas Corpus FILED c/s.
- 27 GARRITY, J. ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS ENTERED. cc/cl.
- Oct. 4 Petitioner's motion for certificate of probable cause FILED WITH CS.
- 6 GARRITY, J. Re motion for certificate of probable cause — "ALLOWED" and ordered that certificate issue.
- 10 GARRITY, J. CERTIFICATE OF PROBABLE CAUSE ENTERED. cc/cl.
- 10 Petitioner's Notice of Appeal filed. Cpy to David Mills, Asst. Atty Gen.
- 11 Certified copy of docket entries and original pleadings delivered to the Court Of Appeals.

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UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF MASSACHUSETTS  
[Title Omitted in Printing]

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*PETITION FOR WRIT OF HABEAS CORPUS*

Respectfully represents petitioner Benjamin A. DeChristoforo:

I.

Petitioner resides in the Commonwealth of Massachusetts within the judicial district of this court.

II.

Respondent is the Superintendent of the Massachusetts Correctional Institution, Walpole, the state prison of the Commonwealth of Massachusetts. He and the said institu-

tion are situated in Walpole, Massachusetts, within the judicial district of this court. As Superintendent, he is responsible for the custody and control of prisoners in said institution and governs and manages them pursuant to their respective sentences until their sentences have been performed or they are otherwise discharged by due course of law or they are removed by the Commissioner of Correction for the Commonwealth.

### III.

On April 30, 1969, petitioner was found guilty in the Superior Court for Middlesex County, Massachusetts, of murder in the first degree with the recommendation that the death penalty not be imposed and also of unlawfully carrying a firearm. On the same day, petitioner was given a life sentence on the murder indictment and a concurrent four to five year sentence on the unlawfully carrying of a firearm indictment. (R. 38, 63.<sup>1</sup>) Petitioner was thereupon committed to the Massachusetts Correctional Institution, Walpole, and ever since then petitioner has been and still is confined by respondent in said institution.

### IV.

Petitioner has exhausted his remedies available in the courts in the Commonwealth of Massachusetts by seasonably appealing from the judgments of the Superior Court for Middlesex County to the Supreme Judicial Court of Massachusetts pursuant to G.L. c. 278, ss. 33A - 33G, as amended, and by filing his assignments of error, which judgments were on December 7, 1971, affirmed by the said Supreme Judicial Court (1971) Mass. Adv. Sh. 1707, 277

<sup>1</sup> Filed herewith is the entire record which was before the Supreme Judicial Court for the Commonwealth of Massachusetts. Said record consists of one volume of "Defendant's Appeal and Assignment of Errors", certified by Edward J. Sullivan, Clerk of the Superior Court for Middlesex County, referred to herein as "R."; and seven volumes of the transcript of the proceedings in the Superior Court for Middlesex County, certified by the court stenographer referred to as "Tr."

N.E. 2d 100). (Chief Justice Tauro and Justice Spiegel, being two of the five Justices who heard oral argument, filed separate and concurring dissenting opinions.)

## V.

Petitioner is in custody as a result of the aforesaid convictions and sentences in violation of the Fourteenth Amendment to the Constitution of the United States as hereinafter set forth.

## VI.

Massachusetts violated petitioner's federal constitutional right to a fair and impartial trial in each of the following respects:

A. The defendant, over his objection, was tried jointly with a co-defendant. At the conclusion of the evidence, the co-defendant pleaded guilty (in the absence of the jury) to murder in the second degree. The trial then resumed with only the defendant DeChristoforo. The trial judge stated "Mr. Foreman, Madam and Gentlemen of the jury, you will notice that the (co-)defendant Gagliardi is not in the dock. He was pleaded 'guilty' and his case has been disposed of. We will, therefore, go forward with the trial of the case of Commonwealth v. DeChristoforo. The arguments will be held at 2 o'clock this afternoon."<sup>2</sup>

During the course of the prosecutor's closing arguments to the jury he made a highly improper and prejudicial argument, and implicit in that argument was the contention that both the defendant Gagliardi and DeChristoforo had

<sup>2</sup> "The jury should have been given explicit instructions that they were to draw no inferences as to DeChristoforo's innocence or guilt from the elimination of the co-defendant from the case. Announcing to the jury merely that the co-defendant had pleaded guilty, without more, had the probable effect of leading to surmise and speculation in its deliberations. In such circumstances failing to give explicit instructions diminished significantly, the defendant's right to a fair and impartial verdict.

"DeChristoforo, left as the sole defendant, and without appropriate instruction to the jury, found himself in a precarious position. It was in this setting that the prosecutor made improper remarks in his closing arguments

offered to plead guilty to a lesser charge than first degree murder and that the District Attorney had accepted co-defendant Gagliardi's offer but rejected DeChristoforo's offer. Not only was there no evidence that the defendant had offered to plead guilty to any offense, but in fact throughout the trial and even during his unsworn statement to the jury, the defendant maintained his innocence. (Tr. 933-936.)

The prosecutor stated in his summation:

"I do not know what they want you to do by way of a verdict. They (sic) said they hoped that you find him not guilty. *I quite frankly think that they hope you find him guilty of something a little less than first degree murder.*" (See Tr. 910.) (Emphasis supplied.)

A little later in his summation, the prosecutor argued:

"I expect that you will return a verdict that is a reflection of the truth. *I honestly and sincerely believe that there is no doubt in the case, none whatsoever. I honestly and sincerely believe that you people feel that way.*" (See Tr. 913.) (Emphasis supplied.)<sup>3</sup>

The trial judge contributed in depriving the petitioner of his right to a fair trial by his failure to correct the harmful effect of the arguments. The cumulative effect of the prosecutor's arguments without adequate and corrective instructions, coupled with the jury's knowledge without cla-

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to the jury." (1971 Mass. Adv. Sh. 1719, 1720, dissent of Tauro, C.J., concurred in by Spiegel, J.)

<sup>3</sup> "It must be emphasized that the highly prejudicial nature of the prosecutor's statement to the jury can be fully assessed only in context with the fact that the jury already knew that the co-defendant had pleaded guilty. The jury had received no clarifying instructions as to this turn of events. In the circumstances, the prosecutor's argument may have left an inference with the jury that both defendants had offered to plead guilty to a lesser charge than first degree murder, and that the district attorney had accepted the co-defendant's offer but rejected DeChristoforo's offer. Even if the defendant had offered to plead to a lesser offense, this fact would have been



rifying instructions that the co-defendant Gagliardi had pleaded guilty at the close of the evidence, further contributed to deprive the petitioner of his right to a fair trial.<sup>4</sup>

B. The trial judge erroneously refused to permit petitioner's attorney to inspect the grand jury's testimony of a police officer who testified on direct examination during the trial that it was petitioner who had made a false incriminating statement at the scene, despite the fact that cross-examination of the officer showed that he had previously testified at a probable cause hearing involving a co-defendant when it was necessary to submit sufficient evi-

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inadmissible. Indeed, its admission would constitute fatal error. See *Kercheval v. United States* 274 U.S. 220; *State v. Abel*, 320 Mo. 445. In the present case, however, there is nothing to suggest that the defendant or his attorney had at any time negotiated for a guilty plea or conceded the defendant's guilt.

"Furthermore, shortly after making the first improper statement, the prosecuting attorney compounded the original impropriety by stating his personal belief as to the guilt of the accused.... The statement by the prosecutor of his personal belief in the defendant's guilt compounded the serious harm resulting from the prosecutor's earlier improper statement, for the statements taken together might lead to an inference that the prosecutor had personal knowledge of the defendant's guilt by reason of the defendant's unsuccessful attempt to plead to a lesser crime. The cumulative effect of the remarks of the prosecutor with no adequate and corrective instructions, coupled with the jury's knowledge without clarifying instructions that the co-defendant had pleaded guilty at the close of the evidence, seriously prejudiced the defendant's right to a fair trial." (1971 Mass. Adv. Sh. 1720, 1729, dissent of Tauro, C.J., concurred in by Spiegel, J.)

<sup>4</sup>Reardon, J., in the majority opinion, said: "The defendant is quite justified in objecting to certain portions of the prosecutor's closing argument. It was clearly improper for the prosecutor to state 'they (the defendant and his counsel) said they hoped that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first degree murder.' It was further improper for the prosecutor to state at another point his personal belief of the guilt of the accused." (The full bench were apparently in agreement that the argument made by the prosecutor was clearly improper.) (1971 Mass. Adv. Sh. 1711.)



dence to hold that co-defendant for the grand jury, that it was the co-defendant who had told the falsehood.<sup>5</sup>

WHEREFORE, petitioner prays as follows:

1. That an order of notice be issued directing respondent to show cause why the writ should not be granted.
2. That a writ be granted directing respondent to produce petitioner at all hearings held by this court.
3. After a hearing on the merits, a writ be issued directing that petitioner be discharged from further custody.
4. For such further relief as law and justice require.

(s) BENJAMIN DE CHRISTOFORO  
BENJAMIN A. DECHRISTOFORO

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK:SS

July 7, 1972

Then personally appeared the above-named Benjamin A. DeChristoforo and made oath that the foregoing PETITION FOR WRIT OF HABEAS CORPUS by him subscribed is true to the best of his knowledge and belief,

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<sup>5</sup> Justice Spiegel's dissent, in which Chief Justice Tauro concurred, points up the fallaciousness of the majority argument and makes out a strong case for a due process violation. Justice Spiegel in his conclusionary statement, in which Chief Justice Tauro joined, concludes "...I am convinced that he (DeChristoforo) did not receive a fair trial and thus I would reverse the judgment and set aside the verdict."

The majority, (1971 Mass. Adv. Sh. 1710, 1711) through Justice Reardon, stated "we recognize the difficult burden which this rule (particularized need) places upon a defendant seeking to impeach such a witness on the basis of inconsistencies between his grand jury testimony and his trial testimony. It may be desirable that we give further consideration to this rule..."

Before me,

(s) ILLEGIBLE  
*Notary Public*  
 (s) PAUL T. SMITH  
 PAUL T. SMITH  
 (s) MANUEL KATZ  
 MANUEL KATZ  
*Attorneys for Petitioner*  
 89 State Street  
 Boston, Massachusetts 02109  
 Telephone: 523-8116

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UNITED STATES DISTRICT COURT  
 FOR THE  
 DISTRICT OF MASSACHUSETTS  
 [Title Omitted in Printing]

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**RETURN**

Now comes the respondent and, by his attorney, makes the following return and answers to the petition for a writ of habeas corpus filed herein:

A. I-III Respondent admits the allegations contained in paragraphs I through III of the petition.

IV Respondent presently does not have sufficient knowledge or information to form a belief as to the truth of the allegation that petitioner has exhausted his remedies available in the Commonwealth of Massachusetts as is alleged in paragraph IV of the petition. Respondent admits the remaining allegations contained in said paragraph.

V Respondent denies the allegations contained in paragraph V of the petition.

VI Respondent denies that Massachusetts violated petitioner's federal constitutional right to a fair and im-

partial trial as is alleged in paragraph VI of the petition. Respondent also denies that the prosecutor "made a highly improper and prejudicial argument" to the jury and denies that "implicit in that argument was the contention that both the defendant Gagliardi and DeChristoforo had offered to plead guilty to a lesser charge than first degree murder and that the District Attorney had accepted co-defendant Gagliardi's offer but rejected DeChristoforo's offer", all as is alleged in said paragraph VI. And further answering respondent denies that the trial judge deprived petitioner of a fair trial and denies that the trial judge failed to give adequate instructions to the jury all as is alleged in said paragraph VI. Respondent also denies that the trial judge committed any error in refusing to permit petitioner's attorney to inspect the grand jury testimony.

B. And further answering respondent says that the petition fails to state a claim upon which relief may be granted.

*By his attorney,*

ROBERT H. QUINN

*Attorney General*

(s) CHARLES E. CHASE

CHARLES E. CHASE

*Assistant Attorney General*

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

MOTION TO DISMISS

Now comes the respondent and, by his attorney, moves this Court to dismiss the petition for a writ of habeas

corpus filed herein since it does not state a claim upon which relief may be granted.

By his attorney,  
 ROBERT H. QUINN  
*Attorney General*  
 (s) CHARLES E. CHASE  
 CHARLES E. CHASE  
*Assistant Attorney General*

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UNITED STATES DISTRICT COURT  
 DISTRICT OF MASSACHUSETTS  
 [Title Omitted in Printing]  
 MEMORANDUM  
 August 28, 1972

DAVIS, M.

Benjamin A. DeChristoforo (hereinafter petitioner) is presently confined at the Massachusetts Correctional Institution, Walpole as a result of a judgment of conviction for the crime of murder in the first degree in the Middlesex Superior Court. The judgment was affirmed by the Supreme Judicial Court. *Commonwealth v. DeChristoforo*, 1971 Mass ad. sh. 1707. Petitioner now brings a petition for writ of habeas corpus in this Court alleging violations of due process during the trial. Specifically, he alleges that due process was violated by (1) prejudicial argument of the prosecutor, (2) denial of grand jury testimony of a particular witness, and (3) the fact that the jury was informed of the codefendant's plea of guilty.

The petition was referred to me for a hearing and report. Following receipt of the case a conference was scheduled with counsel for both parties. At the conference counsel agreed that the facts were not in dispute, hence, no necessity for an evidentiary hearing. Counsel further agreed that for the purpose of the magistrate's report to the district judge, the case could be submitted on memo-

randa, and that oral argument, if required, would be made before the district judge. Pursuant to the agreement, both counsel have submitted memoranda, and this report is made after careful consideration thereof. Of course, this report is also made after consideration of the entire state court record, including the transcript of the trial.

There being no dispute, the facts as stated by the Supreme Judicial Court are repeated here for the sake of convenience.

The following facts are undisputed. About 3:55 a.m. on April 18, 1967, a car in which the defendant and three others were riding was stopped in Medford by two police officers. Shortly thereafter the officers discovered that the occupant of the right hand side of the front seat was dead, having been shot once in the right side of the head and three times in the left side of the chest. The officers also discovered an unfired derringer on the floor of the car behind the driver's seat, and a .38 special caliber Smith & Wesson revolver, which had been fired once, on the rear right hand seat. A pathologist later estimated that the deceased, identified as Joseph Lanzi, died in the car sometime between 3 and 4 a.m. from the wounds described above. The head wound had been inflicted by the Smith & Wesson revolver and the chest wounds by a Harrington & Richardson revolver which was discovered sometime afterward buried in the vicinity of where the car stopped. Before the officers' suspicions were aroused, however, both the defendant, who had been sitting behind the driver in the back seat, and the driver, one Carmen Gagliardi, had left the scene. The other occupant, Frank Oreto, was arrested by the officers after their discovery that the fourth man in the car was dead.

Indictments for murder in the first degree and il-

legal possession of firearms were returned against Gagliardi, Oreto, and the defendant. On October 26, 1967, Oreto, the only one in custody, pleaded guilty to second degree murder and the gun charges. The defendant, against whom an F.B.I. warrant for unlawful flight was lodged in April, 1967, was apprehended by the F.B.I. in November, 1968, at his grandmother's house, where he had been living continuously since the incident. Gagliardi and the defendant were brought to trial together but only the defendant's case went to the jury. At the conclusion of all the evidence Gagliardi pleaded guilty to second degree murder and the firearms charges, and his pleas were accepted.

The Commonwealth, conceding that it was the other two occupants of the car who fired the actual shots, relied on circumstantial evidence to connect DeChristoforo in a joint venture with them to kill Lanzi. Evidence was introduced through Officer Carr, one of the two policemen who stopped that car, that the defendant gave a false name when they asked his identity. He also allegedly told them that the man in the front seat, whom the officers at first thought was asleep, was named "Johnny Simeone," that he had been involved in a fight in Revere and that they were taking him to the hospital. The defendant's immediate flight from the authorities and subsequent concealment was cited by the prosecution as evidence of guilt.

In addition to efforts to impeach the testimony of Officer Carr, counsel for DeChristoforo called only character witnesses and the defendant's grandmother. Although he stated in his opening address to the jury that he intended to prove that the defendant was in the car only because he was being given a ride home

from "The Attic," a bar in which he worked, he introduced no evidence to support this theory. He repeated in his closing argument that there were many reasons consistent with innocence to explain the defendant's presence in the car, including his being given a ride home. Similarly, no evidence substantiated the suggestion in the opening that "certain pressures" other than consciousness of guilt explained the defendant's flight and concealment.

### 1. *The Prosecutor's Argument.*

Examination of recent cases decided by the Court of Appeals for this Circuit leads me to the conclusion that a single comment to the jury by a prosecutor does not, in most instances, result in such prejudice to a defendant requiring a reversal of his conviction. *United States v. Medina*, 455 F.2d 209 (1st Cir. 1971); *United States v. Miceli*, 446 F.2d 256 (1st Cir. 1971); *United States v. Stamas*, 443 F.2d 860 (1st Cir. 1971), cert. denied, 404 U.S. 851 (1971); *United States v. Cotter*, 425 F.2d 450 (1st Cir. 1970). The case must be viewed as a whole, the entire arguments and charge. *Patriarca v. United States*, 402 F.2d 314, 322 (1st Cir. 1968); cert. denied, 393 U.S. 1022 (1969). Following the dictates of *Patriarca*, I have examined the entire case, arguments and charge, and I am of the opinion that not one, but several comments by the prosecutor were improper.

In the case of *United States v. Cotter*, *supra*, Chief Judge Aldrich laid down ground rules of closing arguments by prosecutors. Granted, the *Cotter* case involved a federal prosecution, but the rules nevertheless apply to state prosecutors as well. Judge Aldrich said:

Essentially, the prosecutor is to argue the case. He may discuss the evidence, the warrantable inferences, the witnesses, and their credibility. He may talk about the duties of the jury, the importance of the case,

and anything else that is relevant. He is not to interject his personal beliefs. The prosecutor is neither a witness, a mentor, nor a "thirteenth juror" (the ultimate in absurdity, advanced by the prosecutor in *Greenberg v. United States*, 1 Cir., 1960, 280 F.2d 472). He must not appeal to the passion or prejudice of the jury directly, or, by the introduction of irrelevant matter, indirectly.

It would appear, in the instant case, that the prosecutor has done all that Judge Aldrich says should not be done.

The *Cotter* case was decided subsequent to the state court trial of petitioner. Therefore, it could be argued that *Cotter* is not controlling. But *Cotter* is not cited as controlling the instant case, it is cited to show what fundamental fairness is in closing arguments by prosecutors. As such *Cotter* concerns itself with due process and not merely a decision under federal rules regarding the conduct of federal prosecutors.

The prosecutor in the instant case began his closing remarks to the jury by stating that he was prejudiced to the cause he represented. Therefore, at the outset of the argument we find the personal beliefs of the prosecutor being injected.

Next, in discussing the responsibility of the jury, the prosecutor said, "We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances." This statement was made as a suggestion of a statement which the jurors should make to themselves. Nevertheless, it came out of the mouth of the prosecutor, and the context in which it was said does not detract from the fact that it was an unnecessary vilification which a prosecutor should refrain from doing. *United States v. Medina*, *supra*, at 210-211.

Counsel for the defendant had argued lack of motive to the jury. In rebuttal the prosecutor again resorted to



vilification. In stating why a motive for the murder could not be shown, the prosecutor said, "it is the most cold-blooded, the most sinister, the most clandestine murders that are incapable of showing a motive; you can't do it." In stating that a motive was difficult to prove in such instances, the prosecutor was in effect saying that the crime for which petitioner was on trial was a "cold-blooded murder", a "most sinister" act, and a "most clandestine" murder. Such an argument is a direct appeal to the passion and prejudice of the jury. *United States v. Cotter, supra.*

The thrust of the Commonwealth's case against petitioner was that he aided and abetted the commission of the crime. At no time did the Commonwealth allege that the petitioner fired a single shot. In fact, the Commonwealth expressly claimed that Gagliardi and Oreto fired the fatal shots. However, a derringer was found on the floor of the vehicle at the position where petitioner was observed to be seated. From this evidence the prosecutor was led to say, "I think the whole thrust of the Government's case was that Gagliardi shot him three times here, and Oreto shot him in the back of the head, and our friend, DeChristoforo, had a cocked Rohm derringer ready to administer another shot if that became necessary." Considering the evidence, such a statement was an unwarranted inference. Even if warranted, it was phrased in such a way that the passion and prejudice of the jury would be stimulated.

Petitioner's defense was not that he did not know of the crime or that he was elsewhere. Rather, he claimed that he was being given a ride home from "The Attie" a downtown lounge where he worked, and that he did not know the victim was going to be killed. The prosecutor argued that this was absurd. When commenting on this fact in connection with the number of guns involved, he

said, "So, at that point we have to conclude that Frank Oreto, I suppose, was carrying two guns, or Gagliardi was carrying two guns. You and I know that's a myth." Again, we have the prosecutor injecting his personal belief.

This personal belief was again injected when the prosecutor talked about the use of guns which could not be traced to the defendants. He said, "The inference I want you to draw is: these people are clever enough — is that they don't have guns that can ever be traced to them. You know that and I know it."

Carrying his personal belief one step further the prosecutor said, "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." Counsel for the petitioner objected to this statement. In his charge to the jury, which was the following day, the trial judge instructed the jury to disregard the statement. If this had been the only such statement made by the prosecutor, even without the instruction from the trial judge, it is doubtful that sufficient prejudice could be found warranting relief to petitioner.

But, this was not the first statement of personal belief by the prosecutor; nor was it the last. Toward the end of his argument the prosecutor said, "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way." Compounding this, the prosecutor made reference to the "Perry Mason" television show where the real murderer comes forward at the end and admits his guilt. He said, "The true murderer is not sitting up back with the spectators, about to stand up. The true murderer is right there in the dock, Benjamin DeChristoforo."

Counsel only objected to the one remark of the prose-

cutor referred to above. No other objections were made. The Court of Appeals for this Circuit has made it plain that counsel must object to improper argument. But, that Court has also made it plain in the above-cited cases, that failure to object is not fatal if there is plain error. A great number of improper statements were made by the prosecutor. Whether or not the cumulative effect of these remarks rises to the level of plain error is not for me to decide. This is within the exclusive province of the district judge.

The cumulative effect of the improper statements must, of course, be weighed against the fact that the evidence, while circumstantial was very strong. This evidence included flight by the petitioner.

Also to be weighed is the possible prejudicial effect of the jury knowing that a codefendant had entered a plea of guilty. Petitioner raises this issue as a ground for relief. But relief cannot be granted on this ground alone because petitioner has not exhausted available state remedies with respect to this claim. The state court record does not reflect that the claim was raised; nor does the opinion of the Supreme Judicial Court speak of it. Nevertheless, this claim should be considered in determining whether or not there was plain error.

Following the conclusion of the evidence the Commonwealth rested as did the petitioner and the codefendant, Gagliardi. A recess was taken after which Gagliardi offered a plea of guilty to murder in the second degree. The plea was accepted. When the jury returned the Court said, "Mr. Foreman, madam, and gentlemen of the jury. You will notice that the defendant Gagliardi is not in the dock. He has pleaded 'guilty', and his case has been disposed of." There was no limited instruction to the effect that this should not be considered in deciding the guilt or innocence of the petitioner. I might add, however, that

there was no request for such an instruction. Considering the inference which could be drawn by the jury from the knowledge that one who had been seen daily in the dock with petitioner and was on trial for the same offense, had entered a plea of guilty, I would say that the factor should be taken into account.

2. *The grand jury minutes.*

Officer Patrick Carr was one of the Medford police officers who stopped the car in which the body of the victim was found. In addition to the victim, the petitioner, Gagliardi, and Oreto were in the car. At the scene, Officer Carr inquired about the victim. On direct examination at the trial, Officer Carr stated that petitioner responded to the inquiry. According to Officer Carr, petitioner responded, "He said his name was Johnny Simeone from Boston. In regards to what had happened to him, his reply was that they were involved in a fight in a joint in Revere and that he would be all right. They were going to take him to a hospital." On cross examination it was brought out that at the probable cause hearing, Officer Carr said Oreto had made the statement, not the petitioner. Officer Carr had also testified before the grand jury. Upon learning of this fact, counsel for petitioner moved for leave to inspect the grand jury minutes of Officer Carr's testimony. The motion was denied. The Supreme Judicial Court affirmed.

In *Dennis v. United States*, 384 U.S. 855 (1966) the Supreme Court found that counsel should have been permitted to inspect the grand jury minutes of a particular witness after that witness had testified on direct examination at the trial. There were several reasons given why the circumstances of that case made a showing of a "particularized need." One important reason was the fact that the grand jury testimony had been given seven years before the trial. Other reasons included the fact that wit-

nesses whose testimony was sought were key witnesses, two being accomplices and one a paid informer, and mistakes made by one witness on cross examination about significant dates.

Comparing *Dennis* to the instant case I find that the indictment was returned two years before trial. This is not as long as the seven years in *Dennis*, but it is an appreciable time. There is no question that Officer Carr was a key witness. His testimony mentioned above, according to the prosecutor, was consciousness of guilt. And, it was shown that he had made a prior inconsistent statement which petitioner considered to be crucial. The difference between the two cases appears to be slight.

In any event, regardless of whether or not the circumstances of the two cases are similar, I am of the opinion that a "particularized need" has been shown once a witness takes the stand who has testified before the grand jury. If a witness has testified before, out of the presence of a defendant and counsel, there is no way of knowing whether or not the present testimony is consistent with what was said before without examining the prior testimony. As the court pointed out in *Dennis*, only counsel can make the determination of usefulness for impeachment or other legitimate purposes.

My opinion on this issue is in complete agreement with Mr. Justice Spiegel's dissent in the instant case and the cases of *United States v. Youngblood*, 379 F.2d 365, 370 (2nd Cir. 1967); *United States v. Amabile*, 395 F.2d 47, 53 (7th Cir. 1968); *Harris v. United States*, 433 F.2d 1127, 1128-1129 (D.C. Cir. 1970), cited therein.

(s) WILLIE J. DAVIS

*United States Magistrate*

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

STENOGRAPHIC TRANSCRIPT OF HEARINGS

[2] PROCEEDINGS

The Clerk: Miscellaneous Civil 72-69-G, Benjamin De-Christoforo versus Robert Donnelly.

The Court: Good afternoon, gentlemen. Could you just for the record please state your name and address. Mr. Smith.

Mr. Smith: Paul T. Smith, and I represent the petitioner, Benjamin A. DeChristoforo. My address is 89 State Street, Boston.

The Court: All right.

Mr. Mills: Your Honor, David A. Mills, Assistant Attorney General, representing the respondent, Robert H. Donnelly. Our address is 131 Tremont Street in Boston.

The Court: Thank you. Let me say at the outset that I hadn't realized until receiving the magistrate's memorandum that the Court's reference to him was quite as broad as what he interpreted it to be. I don't know that this affects the consideration that the Court will give to the magistrate's memo, but there is a specific jurisdiction that the magistrate has in habeas corpus cases, and, as noted by the deputy clerk in my session, the case was referred for hearing and report pursuant to the statute. What actually I had in mind was Section 636, subsection 3, of Title 28, defining the powers of the magistrates, which provides that the additional duties authorized by rule may include, but are not restricted to, and then "(3) preliminary review of applications for post-trial relief made by individuals [3] convicted of criminal offenses, and submission of a report and recommendations to facilitate the

decision of the district judge having jurisdiction over the case as to whether there should be a hearing."

So actually that particular aspect of it was resolved rather early in Magistrate Davis's report. He said because of counsel's agreement as to the nature of the issues on this habeas corpus petition, and because the facts, at least as regards what occurred in the state court, not being in dispute, that there would be no need for an evidentiary hearing. He goes on to give his views as to the law, and I certainly recognize them as being the views of an impartial expert and one in whom the Court has considerable confidence.

On the other hand, I thought I should state at the outset that I had not intended to refer the merits of this whole matter to the magistrate. On the other hand, even if the merits were referred to and decided by him, it is customary at least for me to hear counsel's objections to the magistrate's findings and conclusions, especially conclusions of law. Excuse me?

Mr. Smith: We haven't seen the magistrate's—

The Court: Oh. You haven't seen the magistrate's memo.

Mr. Smith: No.

The Court: Well—

Mr. Mills: We didn't realize one existed, your Honor.

The Court: Well, thank you. Then let me continue on, [4] because I had—I probably should have realized that at least Magistrate Davis's practice is to send a copy down, I guess, to the Court, and his memo to me is dated August 28th and reads as follows: "If Judge Garrity approves the enclosed memorandum, please return the file to our office so that copies may be sent to counsel and the proper docket entries made."

Mr. Davis's memorandum is to the effect that the writ should be granted. He says that, and I will read the last

part of the last paragraph of his opinion, or memorandum: "My opinion on this issue"—this has to do with the Dennis grand jury minutes issue—"is in complete agreement with Mr. Justice Spiegel's dissent in the cases of," and he cites three cases, Youngblood—you will get copies of this, of course—in the Seventh Circuit, and Harris in the Circuit Court for the District of Columbia, and, endeavoring to capsule his findings, he ruled in favor of the petitioner on petitioner's argument that the prosecuting attorney improperly influenced the jury in his closing argument.

One key part of his memo is that counsel only objected to one remark of the prosecutor referred to above. "No other objections were made. The Court of Appeals for this circuit has made it plain that counsel must object to improper argument, but that court has also made it plain in the above cited cases," citing especially the Carter case, "that failure to object is not fatal if there is plain error. A great number of improper statements [5] were made by the prosecutor. Whether or not the cumulative effect of these remarks rises to the level of plain error is not for me to decide. This is within the exclusive province of the district judge," presumably meaning me. Then he turns to the issue of the grand jury minutes, and in effect says, as I mentioned before, that he agrees with Mr. Justice Spiegel that he considers that a particularized need was shown.

Well, when last week I learned from Mr. Rose, my law clerk, of the filing of this memo in effect recommending that a writ issue, I considered that it was a matter of urgency, and that therefore the hearing before me should be set down quickly, and that is why we are here today rather than perhaps later in the week. You are really at a handicap not having received the magistrate's memo, and I might say that this memo to me dated August 28th,



with the magistrate's memo dated August 28th, came to me while I was away on vacation. I saw this myself just today for the first time.

I assume that you are still knowledgeable about the issues and can argue the legal issues here today. Let me at the outset give you the benefit of my very tentative, preliminary thinking on the matter. I see issues here that I consider could go either way. Whether I agree with the magistrate I am just not prepared to say at this point. I haven't really studied this matter sufficiently.

The extent to which objections were made to the prosecutor's [6] argument and the nature of what was said are difficult questions. The First Circuit Court of Appeals in a series of cases, of which Cotter is only one of about six or eight or maybe even ten, has fashioned a very specific rule as to what the district judge must do to counteract prejudicial argument by the prosecuting attorney, and they include telling the jury that the prosecuting attorney has committed error, and in effect requires the district court to censure the prosecuting attorney in the presence of the jury in order that a new trial will not be ordered virtually automatically.

So, the First Circuit has a rule that can be rather readily applied. I believe, although I haven't had a chance to check this yet, that in one of these First Circuit cases there was a visiting judge from another circuit and he said, "Well, we don't have that rule in our circuit. I think the First Circuit rule may be in the minority in that respect." I don't mention that to indicate its being of any diminished vigor in this court, but whether the First Circuit rule is predicated upon a constitutional right and constitutional grounds, which should govern the Commonwealth of Massachusetts, is an open question, in my mind.

The second question is what the magistrate says, what the cumulative effect of these improper arguments was.

I have read most of this file, but I have not as yet read the transcript of the argument itself. I just haven't had a chance today, and of [7] course I will do that before deciding.

On the second issue, the question that is not—I don't believe it is discussed specifically in the magistrate's memo, is this one: To what extent is the Dennis case and the cases since Dennis based upon due process of law, and to what extent on the Supreme Court's powers of supervising conduct of trials in the Federal District Court? If the Dennis principle and the cases following Dennis are founded in due process, then Massachusetts must observe those rules just like the federal courts. If, on the other hand, the Dennis case is one in which the Supreme Court is simply setting a standard of trials in criminal cases for federal courts, well, Massachusetts may be free to go along with the Dennis rule or not.

So I am not seeking to restrict your argument to those issues, but I would like to alert counsel at the outset to issues that seem close or troublesome to me. I think that the way I would handle this matter if there had been more time would be to have invited objections to the magistrate's findings and conclusions, and I presume that Mr. Mills would file such objections, and I think I should hear him first, and I will hear Mr. Smith second.

Mr. Mills: You would like to hear the respondent now, your Honor, as to—

The Court: Well, your objections to the magistrate's findings as I have recited them.

[8] Mr. Mills: Well, to the extent that the magistrate recommends that the petition be granted, we of course object.

The Court: Let me throw this out as a possibility: If you would both prefer, but only if you would both prefer, I would have copies of this memo xeroxed, given to you,

and we could have the hearing tomorrow or the day after. It is up to you both. Or, if either prefers, I would have it this afternoon. You can talk to each other—

Mr. Smith: I would prefer to have it this afternoon, but if Mr. Mills feels it would be vital to his position to put it over, I would—

The Court: Well, you are both here, I am here, and this is going to be a question of law in any event. I think we can discuss the legal issues without your knowing what the particular language of the magistrate is.

Mr. Mills: I agree, your Honor.

The Court: Fine.

Mr. Mills: I will be glad—

The Court: So—

Mr. Mills: If you for any reason determine that counsel should or may examine the magistrate's report, may we reserve the opportunity at a later time to submit something in writing as to the magistrate's report?

The Court: Yes, but please don't consider it to be more than another expert opinion. It is an expert opinion, but at [9] the very outset I wanted to state that the limited reference to the magistrate that I thought I was making seems to have been somewhat expanded.

Mr. Mills: I am just frightened, your Honor. It wasn't that you didn't— You were very explicit. It is just that that was the first time that I had heard that the magistrate had recommended that the writ issue, so I was startled.

The Court: He agrees, basically, with Mr. Justice Spiegel. So now proceed.

Mr. Mills: Thank you, your Honor. We spent—I hope it is reflected by our memorandum—a great deal of time and effort in excess of three weeks of fairly constant attention to this memorandum, and I want to avoid the memorandum as much as possible, because you have read it, and at the same time there are certain things in the memo-

random that I would like to highlight. As to your remarks in the court just preceding our opening, in each of the questions that you have crystallized, you speak of the duty of the district judge in each case, and this is where the respondent's position on the question of distinguishing the Patriarca case lies.

The magistrate in our preliminary conference and Mr. Smith in his very fine memorandum put reliance upon the Patriarca case, the First Circuit case, as did the Massachusetts Supreme Judicial Court when it considered the allegedly—or the question of the prejudicial effect of the prosecutor's remarks. It is [10] the position of the respondent that the Massachusetts Supreme Judicial Court properly viewed the remarks of the prosecuting attorney in the light of all of the trial evidence both under its own obligation pursuant to Rules 33(a) through (g) of Chapter 278, I believe, of the General Laws, dealing with the Supreme Judicial Court's obligation in reviewing a capital case, and also in the Patriarca standard.

The reviewing State Appellate Court looks to all of the testimony at trial, all of the remarks of both defense counsel, all of the testimony of the witnesses, all of the evidence which is adduced at the trial. However, on the question of the applicability of the Patriarca standard to the state court proceedings, it is primarily the respondent's position that the Patriarca decision was a review of the proceedings in the Federal District Court, not the review of proceedings in the state court, and I think that the court in Patriarca specifically referred to Rule, I think it is, 51 or 52(a) of the Federal Rules of Criminal Procedure, and basically it is the respondent's position that when the court in Patriarca was speaking of remarks of the United States Attorney at the trial of the case, it was talking not in terms of a due process standard but in

terms of an interpretation of the applicability and meaning of that Federal Rule of Criminal Procedure.

It is the position of the respondent, as outlined in our memorandum, that the remarks that were made were basically [11] improper statements of opinion; that was conceded throughout the state court proceedings. It is our position that the remarks were not offers of evidence, as will be contended by Mr. Smith. It is the position of the respondent that the remarks, though improper, were made in a somewhat permissible way under Massachusetts law which in some cases allows retaliatory remarks by defense counsel when prompted by sufficiently improper remarks by the defense counsel, but in any event, the remarks made by the Assistant District Attorney are not so improper as to rise to constitutional proportions.

The Court: And what help or standard can you offer that might be helpful as to where to draw the line between what violates due process and what does not? We all know surely—Mr. Smith, I think, would be the first to agree—that there is a difference between errors that amount to constitutional dimensions and those that do not, and I would think that you would also agree that there can be a case where the remarks of the prosecutor are so improper as to amount to a denial of due process. Would you make that concession?

Mr. Mills: Yes, your Honor, and it puts me in the—

The Court: Well, this is just an argumentative concession.

Mr. Mills: But it puts me in the position of representing the State Appellate Court. It puts me in a rather awkward position.

The Court: Well, don't feel that way. I am just talking [12] now hypothetically. I expect that there is no judge or criminal practitioner who couldn't conceive of a situation where remarks by a prosecuting attorney are so

prejudicial as to amount to a denial of due process of law. Take the most extreme case you can think of. I expect there is such a case. And my question really is, Where do you draw the line between the two, between the remarks which, while prejudicial, are not of, shall we say, constitutional dimensions?

If you don't like that approach or analysis, don't hesitate to say so. And maybe you think that is not the correct way to approach that issue.

Mr. Mills: I think it is a very difficult way to approach that issue, because I don't think there is any established line, and I can find no cases that really establish a line where a federal court is speaking as to the state court proceedings that would be applicable to this particular case.

The Court: Well, we all know that fairness or lack of fairness in a criminal case can amount to a denial of due process. Don't even restrict yourself to the prosecutor's argument. Take the televising of the proceedings in that *Estes* case, or take the *Shepard* case, where the whole atmosphere was so prejudicial as to amount in toto to a denial of due process. We know that things happen that prevent a trial from being fair, fundamentally, and that amounts to a denial of due process. I am just wondering whether you think that this Court—that is, myself here—[13] should approach this issue from that standpoint. If you don't, tell me why not, and if you do think I should approach it from that standpoint, have you any suggestions as to where the line is to be drawn between error of constitutional dimensions and error which should be thought to be either harmless or perhaps not so grave as to warrant a federal court's interfering with the state criminal procedure?

Mr. Mills: I think what I can do is suggest to the Court that I have read the entire transcript, and I think I can give the Court several good reasons why this case does

not rise to the constitutional proportions that Mr. Smith will argue, but as far as drawing the line for the Court and telling the Court exactly what that line is, I think that is a decision that has so much to do with fairness, which I cannot—I don't have a case or several cases that I can take and say, Here is the definition of fairness beyond which a state may not go and have its state criminal procedures protected as state action.

The Court: Have you any doubt but what the case would—the conviction would be invalidated in the federal court?

Mr. Mills: Well, yes, your Honor. In Patriarca there are several standards that are made explicit there. In fact, I think the court in Patriarca—we have it in our—Excuse me, judge. It has been a busy month....

Well, basically, judge, it seems as though the court in [14] Patriarca said that the court was to look at the entire transcript of testimony and the entire case, and that is what we did. We looked at the entire case. We looked at Judge Sullivan's opening instructions; we looked at his rulings on objections, of course, throughout the course of a seven-day trial; we read all of Mr. Smith's very eloquent and beautiful closing argument; all of Mr. Irwin's closing argument; all of the trial judge's instructions to the jury; and it leaves no doubt in my mind that Judge Sullivan ran a very, very careful court room, when he had in his court room two lawyers who are superior by any standard.

I hate to be so vague, and it is the vaguest I have ever been, whether it be before the Supreme Judicial Court or in the District Court here, but I am kind of left with the feeling that it is not a question of law so much that is citable, but a very onerous burden upon you, as it was upon the justices of the Supreme Judicial Court, to make the determination of what was fair and whether or not

the remarks which are admittedly—or were admittedly improper did so affect the jury as to prohibit them from rendering a true and honest verdict.

After reading the transcript and rereading the transcript, particularly, as I did, paying attention to what the trial judge did throughout the seven-day trial, I come to the determination, which is of no value, really, to this Court, because you will [15] read the transcript yourself, as did the justices, and it just doesn't seem as though the trial judge at any time lost control in the state court of the proceedings. I can only argue and suggest that the transcript showed that at no time did the Court lose contact with the jury.

We then go to the assumption that the jurors did follow the explicit and succinct instructions by Judge Sullivan, and suggest that in view of everything that was said in the course of seven days, the remarks themselves were just not so prejudicial as to constitute reversible error. In any event, let's assume that they were prejudicial. The instructions that Judge Sullivan gave at the time that he gave them, and to the extent that he gave them, cured the remarks of the prejudicial effect, if any they had.

The Court: But please now turn to the second main issue, and that is the failure to disclose the contents of the grand jury minutes.

Mr. Mills: We have two major points with respect to the grand jury minutes. The first is that there is a Massachusetts rule requiring a showing of particularized need, that it was the decision of the trial judge and decision of a majority of the judges of the Supreme Judicial Court, who determined that the petitioner, the defendant then, had not established a particularized need, and that in absence of a particularized need, [16] both the trial court and the Supreme Judicial Court followed the established Massachusetts rule.



Also with respect to the inspection of grand jury minutes, we respectfully call the Court's attention to the question of exhaustion as to the grand jury minutes, on which I think our position is adequately as best we can set forth at page 29 of the memorandum. The Supreme Judicial Court, I believe it was Mr. Justice Reardon's opinion—well the majority opinion, anyway, of the court suggested that the Massachusetts Supreme Judicial Court would take another look at the question of grand jury minutes if the question were more properly presented to it, and the court in a footnote—I think we have set the footnote out in its entirety at page 29 and 30 of the memorandum—the court refused to fully consider the question now raised in this court concerning grand jury minutes because of the absence of a complete record before the Supreme Judicial Court, and the Supreme Judicial Court, of course, feels that it is not incumbent upon the court but upon the appealing party to bring a complete record to the court.

The Court: Well, thank you. Touch on any other point if you wish.

Mr. Mills: I am sorry. I was prepared to speak to all of the testimony and all of the evidence at the trial. You put things in a somewhat different perspective, I think a very fine [17] perspective, because I think the questions of law you raise are actually the questions of law that both briefs actually should have been more precisely directed to. I was on the defensive, of course, about the prosecutor's remarks, in light of Patriarca and as to grand jury minutes. We weren't really sure that that was going to be quite the question that it has become in the court just this afternoon.

As far as our position is up until today, without having seen the magistrate's report, I don't really think that I can add much more to what we put into a memorandum

that we worked a long time on, and I can reel that right off the top of my head, and I—

The Court: Well, I have had the court officer make three copies of the magistrate's memorandum, and I will give you gentlemen at the conclusion of the hearing—you won't have a chance to read it at this point, but if you have a few things to say after Mr. Smith has spoken, I will hear you further.

Mr. Mills: Thank you, your Honor.

The Court: But one thing, I am not sure whether Mr. Smith may feel there are other points besides these two that I have sort of focussed on, that is, the closing argument and the grand jury minutes. Maybe he feels that there is some other ground that I haven't highlighted that he relies upon heavily. The ones that I have spoken about are the ones which the magistrate[18] found in the petitioner's favor. Now I would like Mr. Smith to speak.

Mr. Smith: If your Honor please, I think those are the two fundamental issues, and I think that I recognize, and I respectfully suggest to your Honor that had this case been tried in the United States District Court here, there certainly would not be any question but what the defendant would have been furnished with the grand jury minutes, and there certainly would not be any question but what specific instructions would have been given to the jury with respect to the improper argument made by the prosecuting officer.

Your Honor raises the very nub of the issue here as to whether or not these two issues reach constitutional dimensions to the degree that the Commonwealth of Massachusetts deprived Benjamin DeChristoforo of due process of law in not affording him a fair trial. I think that is probably what the issue is before your Honor. It is our position that both questions reach constitutional dimensions.

With respect to the issue of due process, I suppose that fundamentally the whole question resolves down to the proposition as to whether or not fundamental fairness applied in the trial of the case. I suppose that is what due process generally is, was there fundamental fairness, and that, of course, is kind of a vague term to some extent, but I do think that honorable [19] people, objective people, people who have some feel and understanding for law and procedure, recognize what the term fundamental and basic fairness means.

Firstly, with respect to the question of the grand jury minutes, your Honor. Now, we were confronted with a situation where a police officer by the name of Carr got up and testified during the trial of the case as to certain statements allegedly made by DeChristoforo, and, with all due respect to the majority opinion in the Supreme Judicial Court of Massachusetts, at one point the court said in its opinion that the evidence was strong, was strong evidence against the defendant.

Well, a reading of the transcript and a reading of the opinion itself will demonstrate that, without going into a lot of details, DeChristoforo had been working at a night club as manager, and when he went home, the only evidence that the commonwealth presented was that he was in an automobile, where the police, after the automobile had stopped, found a person who turned out to be dead. The commonwealth conceded during the course of the trial that DeChristoforo did not fire any shots, that a fellow by the name of Oreto, who was sitting in the back seat with DeChristoforo, had shot Lanzi, the deceased, through the back of the head, and that Gagliardi, who had been the driver of the automobile, had shot Lanzi three times in the side.

The evidence was that—and giving the government's side [20] of the evidence, your Honor—that Oreto had

been wearing gloves, and there was no evidence that DeChristoforo had anything covering his hands. There was found in the back seat of the automobile, where DeChristoforo was seated, the gun that the commonwealth conceded Oreto had used to shoot Lanzi in the back of the head, and there was also found on the floor a small pistol which could have been near to where DeChristoforo was seated.

There was no evidence that DeChristoforo owned the gun, that he ever handled the gun. There was no evidence that DeChristoforo—and the evidence was clear that DeChristoforo did not fire any shots. In fact, the commonwealth stated in its argument that Lanzi was shot by Oreto and Gagliardi.

Now, I mention this because the essence of the commonwealth's case, your Honor, was that DeChristoforo had lied to the police officers after the automobile had stopped, and that he had said to Officer Carr that the man in front was a different man, or some such thing, that he had lied about this. In district court, your Honor, in the Malden District Court, Carr, the officer, had testified in a hearing on probable cause involving Oreto that it was Oreto who had told him this, so that one of the essential aspects of the government's case was consciousness of guilt because of false statements made by DeChristoforo.

[21] When it developed during the course of the trial that Carr had originally testified in the Oreto probable cause hearing that it had been Oreto who had made these false statements, and that he was now testifying in the trial of DeChristoforo that it was DeChristoforo who made the false statements, we demanded—we requested the grand jury minutes. I cannot visualize any stronger case for a—If there is such a rule as particularized need, I cannot visualize any stronger case for the defendant being furnished the grand jury testimony of Officer Carr.

So that in determining whether or not, your Honor, this reaches constitutional dimensions, here we have a witness who testified as to one matter in a court under oath, when it served the purpose of the commonwealth to have him so testify in order to have probable cause issue against Oreto, and then Oreto had been convicted, which happened prior to the trial of DeChristoforo, to use the expression of a prominent judge in Massachusetts, they fill in the gap by now saying that it was DeChristoforo who said this, in order to show consciousness of guilt, your Honor, by showing that there was a false statement made. If ever there was something that really cried out for the grand jury minutes so that Carr could be cross examined, it was this case.

The Court: Well, let me interrupt, please. Suppose, [22] because we don't know what the grand jury minutes said, I gather.

Mr. Smith: That is right.

The Court: Nobody does. Suppose the grand jury minutes attributed the remark to DeChristoforo.

Mr. Smith: Right.

The Court: I am wondering if I am not laboring under the same handicap that the SJC said it was laboring under. We don't know what was in there. What the defendant got, the way the posture of the case was, that it had Carr attributing this statement to someone other than the defendant—

Mr. Smith: DeChristoforo.

The Court: —when the events were freshest in Carr's mind, so you had him on an inconsistency of the most damaging nature, it would seem.

Mr. Smith: Right.

The Court: As matters stood. So it may be that the extent of the damage to DeChristoforo from denial of the minutes depends on what is in them, because, as you say,

he would be better off not having them in if Carr's testimony before the grand jury was a hundred percent consistent with what it was at the trial.

Mr. Smith: Either way, that isn't so, your Honor, with all due respect.

The Court: That is why I put the question.

[23] Mr. Smith: This is precisely why the wisdom of Dennis comes out. I think that defense counsel is the one who can best determine what use to make of those grand jury minutes. I have seen grand jury minutes which reiterate prior statements but which can be used to break down a witness either because of the very nature of the reiteration, the manner of the reiteration.

For example, your Honor, one of the famous cases is that cited in *The Art of Cross Examination* was the case of—that Triangle Blouse case in New York, that great fire, where the defense counsel had the only witness repeat her story and she repeated it verbatim, and the fact that it was repeated verbatim demonstrated that she had been rehearsed.

So that it is for defense counsel, your Honor, to determine what use can be made of it, and, as Justice Spiegel pointed out, you have got to be a wizard to guess what there is in the grand jury minutes in order to show a particularized need. It is just impossible to do that, and I would say that once there has been at least the establishment of a prior inconsistent statement as between a statement under oath made in the District Court and a statement made on the trial, that there could be no question that the defense should be furnished with the man's grand jury minutes.

The Court: What did the state court have in mind when it [24] spoke about the record being incomplete? Did it have anything more than the fact that the grand jury minutes were not transcribed?

Mr. Smith: No. The grand jury minutes had been transcribed.

The Court: Or received and marked for identification purposes?

Mr. Smith: Yes. I think that what the court said was that the record was not complete, that I had—that the defense counsel had a method of demanding the production of the grand jury minutes and having it marked so that the Supreme Judicial Court could then make a determination.

Well, I submit, if your Honor please, it is not for the Supreme Judicial Court to determine what use I could have made of it. With all humbleness, I cannot conceive of anyone on that Supreme Judicial Court who has had sufficient experience in the trial of criminal cases to make a proper determination as to what use I could have made of it.

The Court: Well, here is what it comes—I just don't know whether you are right or wrong on that aspect of it, but you have got to recognize, as I am sure you do, that the Supreme Judicial Court and this Court under habeas has to look at the extent of harm done and the reality of the trial, was the man indeed deprived of a fair trial. We cannot—

Mr. Smith: Right.

[25] The Court: It should not be left to speculation.

Mr. Smith: Right.

The Court: More than necessary. And we can certainly conceive of the testimony of Carr before the grand jury, which was indeed harmless to the defendant. It is—

Mr. Smith: I cannot conceive of it.

The Court: No matter what he might have said?

Mr. Smith: I cannot conceive of it. Whatever he said would have been subject to cross examination.

The Court: Oh, yes.

Mr. Smith: If he said the same thing he said in the

Malden District Court, then certainly he would have been lying; that is, it would have been inconsistent. If he said the same thing in the trial of the criminal cases in Superior Court, it would have been inconsistent with the Malden District Court and it would have been subject to cross examination, and it could well be that he was compounding perjury on two occasions rather than on one occasion, so that under either set of circumstances—

I would like to just point this out. As to whether or not this reaches constitutional dimensions, it would seem to me that in the posture of the case, it reached constitutional dimensions. Just to repeat for a moment, if there had been physical evidence against this defendant, your Honor, if there had been an eye witness to a shooting, if there was physical evidence that he [26] had shot him, if there had been any evidence that he had actually pulled the trigger, that would have been one thing, but when you get down to a question of harmless error here, it would seem to me the burden is upon the commonwealth to show that it was harmless error.

I don't think there is any question there was error. It is a question, was this harmless error, and it would seem to me that the commonwealth would have to come forward and show that it was harmless error, and I would submit, if your Honor please, that this was in the light of the fact that the clincher in this case was the consciousness of guilt—that is, inferences rather than direct testimony that we were deprived of our fundamental rights by not being furnished the grand jury minutes.

The Court: Again, I don't have to preface every remark, I expect, by saying I don't know whether you are right or wrong, but it is a preface I often make in the course of inquiring at a hearing.

Mr. Smith: I am not too sure whether I am either.

The Court: Because none of us is. But here is a real important aspect of this, as I see it at this point: These



phrases, you know, constitutional dimensions, fundamental fairness, and denial of due process, are good phrases, but they are not awfully helpful to analysis, and envision a rule to the effect that the pretrial or during trial discovery in criminal [27] cases, of which this Dennis rule is one aspect, simply does not amount to due process, that we have been having criminal trials for decades, and certainly they are a lot better nowadays than they used to be. The defendant gets a chance in many respects where he didn't before, so there has been enormous progress made. But is the discovery rule stated by the Dennis case part of criminal due process?

We know that many things that are considered to be fundamental, and you might also say sacred, or sacrosanct, in the federal realm, such as presentation of evidence to a grand jury, are not part of due process. I was surprised when I read the Connor and Picard case, which is such an interesting case, in the Supreme Court. I was surprised to learn when reading the law in that case that there are a lot of states where you don't have the grand jury at all.

Mr. Smith: Connecticut.

The Court: Yes. That was the nearest one. So when later this week, I think the day after tomorrow, I charge a grand jury here coming in to start its service about how indispensable it is, I will think, well, there are plenty of states that consider that it isn't, and it is not part of due process of law, according to the decision of the Supreme Court of the United States.

Mr. Smith: Right.

[28] The Court: It would be just as easy to say fundamental fairness and constitutional dimensions, it would be just as easy to say that about the grand jury as it is discovery rules. We know that there was virtually no criminal discovery until Jenks and until—

Mr. Smith: —Brady.

The Court: —Brady. Well Brady and Rule 16. But what I am getting at is a long way of asking, have you a precedent? Is there a case to the effect that the Dennis rule is part of due process, that it is founded on the Constitution rather than on the federal court's supervisory powers?

Mr. Smith: I think the Brady case is analogous. I think that the failure to furnish a defendant with material that the state has—by state I mean either the federal government or the commonwealth—which could be of help to him if the defense of his case reaches constitutional dimensions. I don't think there is any question. I don't think any trial lawyer would dispute the fact that the failure to furnish me with the grand jury minutes in that case deprived me of the right to properly cross examine this witness Carr. I cannot conceive of any trial lawyer who would dispute that, whether he be on the civil side of the court or the criminal side of the court, and I would venture to say, your Honor, that the denial of that right is tantamount to the denial of the right to cross examine.

[29] The Court: Well, I again don't want to be contentious, but this is the way these points are refined. You just simply don't have a Brady versus Maryland or the later Giles versus Maryland situation here. It is as simple as that. In those cases, you had an absolute concealment or destruction of evidence that was absolutely exculpatory of a defendant. I should think that a lot here might turn on what is in those grand jury minutes.

Mr. Smith: Well, that may be so, but I think that it is a denial of exculpatory material, regardless of what those grand jury minutes show.

The Court: Well, that is a good argument that you have already made, because that point I didn't really grasp before we had oral argument this afternoon. I get the

point, that whatever was in there, it was fruitful material for effective cross examination.

Mr. Smith: Right.

The Court: But we—

Mr. Smith: And I might say this, your Honor,—

The Court: I don't mean to say I agree with you. I just don't know.

Mr. Smith: No. I don't think that this Court or any court should indirectly place its imprimatur, if it is a close question, upon the refusal to grant jury minutes where there could not conceivably be any harm done to the commonwealth here. [30] If there had been any allegation that somebody's liberty was at stake, somebody's life was at stake, that there was an informer involved, or the like, I could understand that. Here it is just a question of whether or not the key witness, the man who convicted this man, whether his testimony could be subjected to the test of cross examination, and they deny it.

This is not part of the record, but it can be established beyond peradventure of doubt: The Supreme Judicial Court virtually invited me to file a motion for a new trial and request that Judge Sullivan examine the transcript of the grand jury minutes, and so I did, before filing this petition for a writ here, and we had a full hearing before him.

The Court: Before Judge Sullivan.

Mr. Smith: Before Judge Sullivan. And Judge Sullivan first refused to show me the transcript of the grand jury minutes, and secondly, said that he read them and that he just couldn't see what value they would have been to me. I argued to him that I felt I knew much better than he did as to what value they would be to me, and asked him to mark the grand jury minutes for identification for the Supreme Judicial Court, and he refused to do it.

The Court: What is the chronology? Is this after the Supreme Judicial Court decision?

Mr. Smith: After the Supreme Judicial Court decision.  
[31] The Court: I think that is relevant. I don't know whether it is significant.

Mr. Smith: And he refused to mark it even for identification so that in the event I did go up to the Supreme Judicial Court that it would be before them. Now, it may very well be, and I don't doubt him or dispute him—the judge is a gentleman for whom I personally have regard as an individual, but by the same token, your Honor, where could there conceivably be any harm done to the Commonwealth of Massachusetts by furnishing defense counsel at that stage with a copy of the transcript?

The Court: Was Mr. Mills in on that?

Mr. Smith: No. The Assistant District Attorney from Middlesex County was there.

The Court: Yes.

Mr. Smith: It almost becomes a concerted effort to conceal something that might be relevant, and I don't even know that it is. I don't assert any more than, as Justice Spiegel says, you would have to be a mind reader to know what is in there.

The Court: Well, let me—Is this all news to Mr. Mills? Are you aware of the further hearing before Judge Sullivan?

Mr. Mills: No, I am not. I was not there, your Honor.

The Court: Yes. Well, I should think that might have been put in here somewhere.

Mr. Smith: Well, I just felt under the law we didn't have [32] to; in order to bring our petition for habeas corpus, we don't have to file a motion for new trial. I only did it because I didn't want it to appear on the record that I had ignored their implicit suggestion that I make such a motion, but it was to no avail.

The Court: But you have read Connor in the Supreme Court, I am sure, Connor and Picard.

Mr. Smith: Yes.

The Court: The Court of Appeals thought, despite all its caution, as in the Needel and Scafati and other cases, where it requires exhaustion—I dare say there have been fifty cases sent back by the Court of Appeals to the state court to exhaust remedies available in the state court. So in the Connor case, they say, Well, here is one at least where it is clear that the remedies have been exhausted, and the Supreme Court of the United States overruled the First Circuit on it and required that the matter go back to the state court.

How can you argue that you have exhausted your available state remedies in the light of the footnote and in the light of what Judge Sullivan did, you know, not marking this, without having gone back to the SJC?

Mr. Smith: Well, I anticipated this question, your Honor, and it bothered me. First, I don't know as we are going to get anywhere else, because, assuming that we kill another year going [33] up to the Supreme Judicial Court, while this fellow still has been in jail now for over two years, and the Supreme Judicial Court says, "Well, Justice Sullivan says that he doesn't see anything in there that would be helpful to you," which is what Judge Sullivan said. "Well, what of it?" I argued to him. I said, "Judge, you cannot tell me how to try a case. I cannot accept your determination as to whether or not this is of any value to me for cross examination purposes. I have got to decide that, and the only way I can decide it is to see it." And this is precisely what Dennis says.

Now, forgetting about its being of constitutional dimensions I mean, I am using Dennis's rationale, of course Judge Sullivan cannot tell me. With all due respect to Judge Sullivan, if I had to make a determination as to who is going to try a criminal case, he wouldn't be one that I would pick. So—

The Court: Well, I am not disagreeing with that argu-

ment. You have already made that argument every clearly, but I am now looking only to the exhaustion point.

Mr. Smith: Well, I think I have exhausted my remedies by going up to the Supreme Judicial Court originally, and they invited me to do this, and I think that if Judge Sullivan had furnished me with the transcript upon my motion for new trial and had granted me a new trial, then I certainly wouldn't be down here.

[34] The Court: Well, that, I presume— Well, no, maybe not. I was going to say of course that is what would be the outcome of a successful petition here.

Mr. Smith: Petition for a writ here. Right.

The Court: Well, I think I understand, then, this problem of exhaustion. I call it, you know—but I am wondering, shouldn't some of those facts be in this petition?

Mr. Smith: I don't believe so, your Honor, because I don't believe I have to assert that in order to lay a basis for coming down here.

The Court: Right. This is something that maybe Mr. Mills might have put into a return or something of that nature.

Mr. Smith: But to get down to what is even much more fundamental, and that was the argument that was made—

The Court: Just a second. I want to stick with this Dennis point for just one more minute, and then we will go on to the other, because I think this is, by the way, your strongest point, this Dennis point. I think it is stronger than the other one.

Well, I will endeavor to see if I can find some precedents indicating one way or the other whether Dennis is based upon the Constitution or the supervisory power of the federal courts or the Supreme Court over inferior federal courts. You say there was an effective denial of cross examination here. That may be. [35] You would just be stronger, it strikes me, on this point, which I think is your

strongest point, if there were some cases more closely analogous, let's say, than Brady and Giles.

Mr. Smith: Well, I wouldn't think that your Honor would necessarily be striking new ground to find that in the posture of this case, the denial of the right to examine the grand jury minutes of Carr, under these facts and limiting it to these facts, is a denial of due process.

The Court: You may be right. I have, though, myself, to satisfy myself, look to the broader question of discovery in criminal cases. That is something that wasn't even around when we were admitted to the bar.

Mr. Smith: That is right.

The Court: So I think I understand the problems here. Now, then, turn to the other.

Mr. Smith: With respect to— It so happens I think that this is the stronger argument, your Honor. I believe that the argument made by the prosecuting attorney here shatters every concept of due process. First, if your Honor has read the commonwealth's memo of law, or if you haven't read it and will read it, and I am sure you will, I just cannot agree that the facts as set forth there with respect to the nature of my argument are so. I think they are taken out of context, but I think that the commonwealth makes the point that where I made— [36] that I made improper argument, and that therefore this gives the commonwealth the right to make improper argument, and I think that type of argument falls by the wayside by the very nature of the argument.

Obviously, assuming *arguendo* that I made an assertion of my belief in the innocence of the defendant, which I am quite confident I did not, but assuming I did, this certainly doesn't give a state the right to deprive a person of a fair trial by making improper arguments, so that I— But in any event, the opinion of Chief Justice Tauro I think just strikes to the heart of this issue.

What had happened was, we had Gagliardi and DeChristoforo set for trial. DeChristoforo made a motion for severance. The motion was denied. The case went to trial, and, as a result, evidence against Gagliardi was put in, or course, in the presence of the jury, and at times there were instructions given, but there was evidence that went in about the nature of Gagliardi, the type of person he was; it was brought out that he must have been the one who physically fired three shots into the body of Lanzi, and the like, and a pretty sad story was developed which of necessity had to fall back upon DeChristoforo. So that with the background, we made a motion for severance, and it was denied.

After all the evidence was in, after all the evidence was [37] in, evidence that hurt DeChristoforo immeasurably, after all the parties rested, Gagliardi pleads guilty to second-degree murder. That was done in the absence of the jury, to be sure, but then the jury is brought out and Judge Sullivan says to the jury, "You will notice that the defendant Gagliardi is not in the dock. He has pleaded guilty, and his case has been disposed of. We will therefore go forward with the trial of the case of Commonwealth against DeChristoforo."

Now, with that setting, during the closing argument the Assistant District Attorney says to the jury, "I do not know what they want you to do by way of a verdict," referring to the defendant. "They said they hope you will find him not guilty. I quite frankly think that they hope you will find him guilty of something a little less than first-degree murder." Then he compounded it by saying, "I expect that you will return a verdict that is a reflection of the truth. I honestly and sincerely believe that there is no doubt in the case, none whatsoever. I honestly and sincerely believe you people feel the same way."

Now, without going into the cases that are cited in the



memorandum, there is no need to cite any more, it is of course the duty and the obligation of the District Attorney and the judge to have seen to it, whether I objected or didn't object—and I just want your Honor to know that I am quite confident that I protected my client's rights during the course of that [38] trial—it was the duty and the obligation of the judge and the District Attorney to see that he got as fair a trial as the laws of the Commonwealth of Massachusetts and the laws of the United States will afford him, and simply because, assuming that there might have been the improper argument I referred to above that is set forth in the Attorney General's brief, that is no excuse to go on.

The citations in our memorandum and the citations in Chief Justice Tauro's dissenting opinion are sufficient for me to rely upon, and his argument in his opinion is sufficient for me to rely upon. I would like to point this out to your Honor: We have been concerned, as practicing lawyers and as practicing judges, with the standards that have been established by the American Bar Association with respect to the conduct of both the prosecutor and the defense, and in the ABA Standards for Criminal Justice relating to prosecution and defense functions, they say, "This is not primarily a criterion for the making of the determination in a judicial proceeding as to whether or not a person was properly convicted."

I will say this generally, that the standard is set forth in Rule I, Part 1, I-1(e), but it goes on to say: "They may or may not be relevant in a judicial evaluation of prosecutorial misconduct, depending on all the circumstances."

That is a standard that has been accepted by the Board of [39] Governors of the ABA under the caption of "Argument to Jury." That standard has been accepted, so that although generally it is a guide, the conduct of the prose-

ctor with respect to these standards is a guide for the prosecutor, it may be considered by a court in making a determination and a judicial evaluation of prosecutorial misconduct.

The standards go on to say—I am reading now from 5.8(a): “The prosecutor may argue all reasonable inferences from evidence on the record. It is unprofessional conduct for the prosecutor to misstate the evidence or mislead the jury as to the inferences it may draw.” Then, “(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.”

The term “unprofessional conduct,” your Honor, as described in the standards denotes conduct which is recommended to be made the subject of disciplinary sanctions. I mention this solely, and I repeat solely, to point up to your Honor the seriousness with which the standards regard violations of that standard that I have just read relating to argument to the jury, and to further argue that they are relevant in the making of a judicial determination and as a criterion for your Honor’s evaluation of the validity of DeChristoforo’s conviction, and I say that the standards set this forth and the standards say [40] that your Honor has a right to take that into consideration in determining whether or not DeChristoforo was convicted in accordance with due process of law.

In addition—and this is about the end of it—the approved ABA standards relating to the function of the trial judge, which in substance was approved in July of 1971 by the House of Delegates, states: “The adversary natures of the proceedings do not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.

The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law. The trial judge should not allow the proceedings to be used for any other purpose."

In the commentary, it goes on to say, "It is the proper role and function of the trial judge"—and I am now referring to Judge Sullivan—"to exercise his judicial powers in such a manner as to give the jury the opportunity to decide the cases free from irrelevant issues and appeals to passion and prejudice." And they cite in their standards Gittelson's book: "A trial judge's credo must include his affirmative duty to be an instrumentality of justice."

I say that Judge Sullivan, in failing to give specific [41] instructions to the jury with respect to the improper argument made by the Assistant District Attorney, failed in his duty to insure the rights of the defendant to a fair trial in accordance with our concept of due process.

Then they incorporate the same standard that appears in the standards pertaining to prosecution and defense, in Standard 5.10, and the standard provides: "The trial judge should not permit counsel, during the closing arguments to the jury, to express his personal opinions as to the guilt or innocence of the defendant."

The basic provisions in the function of the trial judge, repeating the standards set forth in "Prosecution Function," are set forth as stated in the commentary, because of the importance of the subject and to emphasize the trial judge's obligation to enforce these prohibitions against improper argument, which carries a high potentiality for prejudice to the interests of justice, and I say, if your Honor please, that I agree with your Honor that we lawyers too often use language which lay people don't understand, we have our own language of justice and right and wrong and the like, but I think there are fundamental

concepts that all people understand, and they understand what is unfair.

I think that it is manifestly unfair to allow a prosecutor to represent his own personal opinion with respect to the guilt of a person accused of crime, to argue that the defendant in [42] this case was looking for a deal, and there wasn't the slightest evidence of it, because DeChristoforo consistently refused to look for a deal, and when you have a situation where, at the end of the trial, Gagliardi pleaded guilty and then the prosecutor argued to the jury that we were looking for something less than a first-degree murder conviction, implicit in that argument, your Honor, was that we tried to plead guilty to something less than first-degree murder, that he accepted Gagliardi's plea but would not accept our plea.

If anything was ever unfair, and if ever a jury had every right in the world to believe that a prosecutor, with the dignity of his office, was making a representation to them that DeChristoforo was the real killer here, even though he had never pulled the trigger, and that Gagliardi was entitled to consideration but we were not, it was that argument that he made, so I say, if your Honor please, that in the lines of the Berger case, in the lines of other cases, if ever there was a deprivation of due process of law, it was in that argument.

I go along with the Chief Justice of our Supreme Judicial Court and I go along with Mr. Justice Spiegel when they say that it was just impossible in the light of all of this for the defendant to have gotten a fair trial.

The Court: Let me just— And you have picked up Magistrate Davis. Magistrate Davis is no tyro in these matters.

[43] Mr. Smith: That is right. He was a prosecutor and a United States Attorney.

The Court: He argued all these habeas cases in the

SJC when he was an Assistant Attorney General before he came down here as an assistant. So I don't want to ignore Mr. Davis's opinion. I have got to look at the case, however, I insist, differently than I would if I were an eighth member of the Supreme Judicial Court of Massachusetts. I don't think the issue is identical in this court as it is in the state court. Maybe there will be no Circuit Court decisions on the relationship between due process and these particular aspects of unfairness that form the basis of this petition, but I want to certainly see if there are. Maybe I can find some; maybe I cannot.

I want to give you also copies of Mr. Davis's memorandum. I do think the plaintiff has a real hurdle on this exhaustion point on the Dennis matter, but I do understand your argument that whatever is in there, you were denied due process by not getting it at the trial. I agree also that there is no obligation on the petitioner here to spell out all these facts that you consider to be irrelevant, but I don't even know the chronology of it. Was the hearing on the motion for new trial before Judge Sullivan after the filing of the petition here or—

Mr. Smith: No. Before.

[44] The Court: Now, it came to Mr. Mills as news. He didn't even know about it. That is surprising.

Mr. Smith: Well, he wouldn't be a party to it, your Honor.

The Court: Well, I agree, but you would think he would have taken a look at the docket.

Mr. Mills: Judge the problem is that in the Attorney General's Office, we pick up all the cases from several District Attorneys of the commonwealth once they arrive in federal court, so I never really knew the name DeChristoforo. I knew the name Paul T. Smith, but I didn't know DeChristoforo until four weeks ago.

The Court: Well, I should think you would get a copy of the dockets of these cases.

Mr. Mills: Well—

The Court: It is just a suggestion. It costs fifty cents a page retail, ten cents a page—

Mr. Smith: Well, I can understand their not doing that, your Honor, because when we filed our petition, all we filed as part of the record was everything up to the point that we had gone through the Supreme Judicial Court on, so there would be no alert signal as to his getting it. I can understand that. But I gave some thought to this, but here is all this would mean: We would then have to go up from a discretionary motion on the part of Judge Sullivan, motion for new trial, which is [45] completely discretionary, go up to the Supreme Judicial Court and either be confronted with one of several answers: Well, this is discretionary, and we cannot say he abused his discretion, because how can I argue he abused his discretion unless I saw what the grand jury minutes were?

The Court: Well, I really understand the situation.

Mr. Smith: And I have got a fellow that has been lying over there in state prison now for over two years, and if there is any chance to get him out and get a new trial, I want to do that. I think he is entitled to a fair trial. That is all I care about. I have lost tough cases, your Honor, and I don't go around complaining too much about them, but all we want is a fair trial. We didn't get a fair trial, I say, and certainly your Honor knows it wouldn't be a fair trial down here, it wouldn't have been a fair trial not to have given us the minutes, it wouldn't have been a fair trial to have allowed the prosecutor to make those kinds of arguments.

The Court: Well, thank you. I will read all these things more carefully.

Mr. Mills: May I speak to two points, your Honor.

The Court: Yes. You say you want to speak to a couple of points?

Mr. Mills: May I just speak to two points?

The Court: Yes, but— Certainly.

[46] Mr. Mills: Well, only because I think it would be inappropriate if I didn't. With respect to grand jury minutes, one of the foundations for Mr. Smith's argument is that the testimony of Officer Carr and its apparent inconsistency, if there be one and if the court determines that there is one, was the essential aspect of the commonwealth's case at trial. Well, it would be inappropriate for me to not speak to that—

Mr. Smith: Pardon me. If I said that, I didn't mean it. I don't say it was the essential aspect of it. I think it was one of the important factors.

Mr. Mills: Well, judge, the jury was presented with a case for the commonwealth, I think, with ten or twelve or fifteen witnesses, which included placing of the petitioner, as a defendant, at four o'clock in the morning in the middle of a rain storm in an automobile with three other persons, one of them dead and bloody, and the commonwealth's case had two police officers describing this to the jury and exhibits as to the firearms that were found in the automobile, and, of course, the pathologist's testimony as to where the four gun wounds—

The Court: Well, honestly, when you said two points, I thought you meant two rebuttal points, in your belief. What is the second point? Don't argue the whole thing. This is surrebuttal.

Mr. Mills: Well, yes. The second point being that Mr. [47] Smith suggested that the prosecuting attorney argued to the jury that the defendant, now petitioner DeChristoforo, had offered a plea of something less than first-degree murder. Well, I think that Mr. Smith's argument is ingenious and I think it is a tribute to him, I think that his

argument is brilliant, but nowhere in the transcript— This is a creation of Mr. Smith's ingenuity, which I admire, but it is an inference which is Mr. Smith's argument, it nowhere appears in the argument of the prosecuting attorney to the jury. It was considered fully by the Supreme Judicial Court, and I think that it is sufficiently briefed in our memorandum.

The Court: Well, he just says it is implied. He doesn't say it is a correct argument. He says that you put two and two together, and when the prosecutor talks about finding him guilty of something less than first-degree murder, it implies in conjunction with the change of plea on the part of Gagliardi, this fellow was shopping for the same thing. I know there was no explicit argument made to that effect.

Mr. Mills: Well, it is the respondent's position—and I would just, if I could have twenty seconds more, I think it is equally as clear, or even clearer, that what the Assistant District Attorney was referring to were matters of proof connected with the trial, and that any reference whatsoever to the plea of Gagliardi is the fourth or fifth possible inference from [48] that argument, and certainly far from the first, the foremost.

The Court: Well, thank you.

Mr. Mills: Thank you, your Honor.

The Court: Here are these copies. Normally I would say that I will— I don't know whether I want to give them to you right now or whether I will say, as I usually would, but rather than say it in writing, just repeat what I have said before. The memos go to you for a foundation for this afternoon's hearing, not as court orders, and in that understanding, let me give them to you.

Mr. Smith: Thank you, your Honor.

The Court: I am not going to decide this thing before this week is out, I am certain of that. If you want to get something in— There is no obligation on anyone's part



to file anything. If you would like to file anything on any aspect of it by next Monday, I would be happy to take it, if you would like to file any suggestions.

Mr. Smith: I would like to file a suggestion that you yield to the magistrate.

The Court: Well, so long as you file it in writing.

Mr. Mills: Thank you, your Honor.

The Court: Now we will recess.

[Thereupon the hearing was concluded.]

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
[Title Omitted in Printing]  
ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS  
September 27, 1972

GARRITY, J. Upon consideration of the petition and the Magistrate's memorandum and the briefs of the parties, and after hearing, the court rules that, with respect to the first contention of the petitioner, the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial. With respect to the second contention, viz., that the trial judge's refusal to permit petitioner to inspect the grand jury testimony of officer Carr deprived him of a fair trial, the court finds that the petitioner has not exhausted available state remedies, 28 U.S.C. § 2254(b). *Picard v. Connor*, 1971, 404 U.S. 270. The opinion of the Supreme Judicial Court of Massachusetts, in affirming the judgment of conviction against the petitioner, indicated a method whereby petitioner could, by moving in the trial court for a new trial, have presented the Supreme Judicial Court with a record incorporating the relevant grand jury testimony. *Commonwealth v. DeChristoforo*, 1971 Mass. Adv. Sh. 1707, 1710-11 n. 2. At oral argument on this

petition, counsel for petitioner asserted that, pursuant to this suggestion, he had moved the trial court for a new trial in an attempt to have the grand jury testimony incorporated into the record; apparently the trial judge, however, merely read the testimony himself and, concluding that its production would not have benefitted the petitioner, he refused to so incorporate the testimony. Our reading of the Supreme Judicial Court's opinion indicates to us that, if petitioner appeals the trial judge's decision, the appellate court may remand the case with a direction that the testimony be incorporated.\* Therefore it is ordered that the petition be denied without prejudice to petitioner's rights after exhaustion of available state remedies.

(s) W. ARTHUR GARRITY, JR.

*United States District Judge*

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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
[Title Omitted in Printing]

CERTIFICATE OF PROBABLE CAUSE

The petitioner has filed a motion for Certificate of Probable Cause to appeal pursuant to Title 28, United States Code, Section 2253 and the motion was allowed on October 6, 1972. Accordingly, I hereby certify that his appeal is not frivolous and that the allegations of his petition, in the light of the present state of federal criminal and

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\* Cf. *United States v. LaVallee*, 2 Cir., 1965, 344 F.2d 313, 315, "It could be argued with some force that when the grand jury testimony is exculpatory and the trial testimony inculpatory, or even when both are inculpatory but so inconsistent as to cast serious doubt on the veracity of the witness, failure to make the grand jury testimony available on request is within the principle of decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense."

constitutional law, afford a basis for the issuance of this certificate of probable cause for appeal.

(s) W. ARTHUR GARRITY, JR.

*United States District Judge*

Date: Oct. 10, 1972

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that petitioner, Benjamin A. DeChristoforo, hereby appeals to the United States Court of Appeals for the First Circuit from the order denying his petition for writ of habeas corpus, entered on September 27, 1972.

By his attorney,

(s) PAUL T. SMITH

PAUL T. SMITH

89 State Street

Boston, Massachusetts 02109

Tel. (617) 523-8116

---

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

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No. 72-1338

BENJAMIN A. DeCHRISTOFORO,

PETITIONER, APPELLANT,

v.

ROBERT H. DONNELLY,

RESPONDENT, APPELLEE.

1972

Oct. 12 Record on appeal in one volume filed and case docketed.

## 1972

- Oct. 17 Appearance of Paul T. Smith, for the appellant filed.
- Oct. 24 Motion, assented to, filed. Order (Coffin, Ch.J.) enlarging the time for filing statement and designation to November 1, 1972, and enlarging the time for filing appendix and brief for appellant to November 24, 1972. Notices mailed.
- Oct. 25 Supplement to record on appeal consisting of summary of record, and 7 volumes of state court transcripts filed.
- Nov. 1 Statement of issues and designation filed.
- Nov. 7 Supplement to record on appeal consisting of one volume of transcript filed.
- Nov. 13 Motion, assented to, filed. Order (Coffin, Ch.J.) granting leave to appellant to amend his designation. Motion, assented to, filed. Order (Coffin, Ch.J.) granting leave to Blanchard Press to withdraw temporarily certain state court transcripts. Notices mailed.
- Nov. 14 Appearance of David A. Mills for appellee filed. Counter designation filed by leave of court.
- Nov. 15 Motion to strike filed. Order (Coffin, Ch.J.) allowing appellant's motion to strike appellee's counter-designation etc. Notices sent.
- Nov. 24 Brief for appellant and appendix in one volume filed.
- Dec. 15 Brief for appellee filed.
- Dec. 26 Assigned for hearing at the coming January 1973 session.

## 1973

- Jan. 5 Heard before Aldrich, McEntee and Campbell, JJ.

1973

- Jan. 15 Informal hearing before Aldrich and Campbell, JJ. pursuant to Clerk's letter of January 9, 1972. Stipulation *re* defendant's plea in state court filed.
- Feb. 22 Judgment: The order of the District Court is vacated and the case is remanded to that Court for further proceedings consistent with the opinion of the Court filed today. No costs. Opinion by Aldrich, Senior Judge. Dissenting opinion by Campbell, Circuit Judge. Notices mailed.
- Mar. 7 Petitioner's motion for release filed. Order (Aldrich, McEntee and Campbell, JJ.) denying motion to be released on bail. Notices mailed.
- Mar. 16 Mandate issued; copy filed. Original papers returned to the district court.
- May 7 Certified copy of "Notice of Appeal" sent to Supreme Court.
- Oct. 29 Certified copy of order granting certiorari (10/23/73) filed.

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

[Title Omitted in Printing]

STIPULATION OF COUNSEL

January 15, 1973

It is stipulated that at no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial.

(s) PAUL T. SMITH

*For Appellant*

(s) DAVID A. MILLS

*For Appellee*

*Ass't. Atty. General*

---

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

No. 72-1338

BENJAMIN A. DeCHRISTOFORO,  
PETITIONER, APPELLANT,  
v.  
ROBERT H. DONNELLY,  
RESPONDENT, APPELLEE.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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Before  
ALDRICH, McENTEE and CAMPBELL,  
*Circuit Judges.*

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*Paul T. Smith*, with whom *Harvey R. Peters* and *Jeffrey M. Smith* were on brief, for appellant.

*David A. Mills*, Assistant Attorney General, Chief, Appellate Section, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *William T. Harrod, III*, were on brief, for appellee.

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February 22, 1973

ALDRICH, *Senior Judge*. At four o'clock on the morning of April 18, 1967, the police drew alongside a car that had stopped in a residential area to question the four occupants. The driver, one Gagliardi, was questioned first. He left to enter a house, which he incorrectly asserted to be his own. Petitioner DeChristoforo was questioned next. After he had left the scene, ostensibly to join Gagliardi, the police discovered that the passenger in the front seat was not asleep, as they had been told, but dead. He had been shot in the head by a revolver found on the floor behind him in front of the fourth passenger, Oreto, and in the left side, next to the driver, by a revolver later found buried in the

vicinity. To complete the picture, a fully loaded derringer — a small weapon of low power — was found on the floor in front of the seat behind the driver, where petitioner had been sitting. Further facts, to the extent relevant, will be mentioned later. Others may be found in the opinion of the Supreme Judicial Court dismissing petitioner's appeal. *Commonwealth v. DeChristoforo*, 1971 Mass. A.S. 1707.

Petitioner's absence to seek Gagliardi was extended for some fifteen months, when petitioner was discovered to have been living at his grandmother's house. Eventually he, together with Gagliardi, Oreto having previously pleaded to second degree murder and a weapons charge, were brought to trial. At the close of the evidence, in the absence of the jury, Gagliardi pleaded guilty to murder in the second degree. The trial continued and petitioner was found guilty of first-degree murder, but with a recommendation that the death penalty be not imposed. His appeal was submitted to the full Court, but failed by a vote of 5-2. Thereafter petitioner sought a writ of habeas corpus in the district court. The case is here, on the state court transcript, on an appeal from an order dismissing the petition.

We are concerned solely with what petitioner claims was improper closing argument by the prosecuting attorney. The Massachusetts court was unanimous that the argument was improper, but divided on the issue of its prejudicial effect. The objectionable statements fall into two categories: the prosecutor's forceful expression of his personal belief in petitioner's guilt,<sup>1</sup> and his opinion that even petitioner expected a conviction.<sup>2</sup>

The impropriety of a prosecutor adding the weight of his personal opinion of a defendant's guilt to the scales

<sup>1</sup> "I honestly and sincerely believe that there is no doubt in this case; none whatsoever."

<sup>2</sup> "I quite frankly think that they [petitioner and his counsel] hope you find him guilty of something a little less than first degree murder."

of justice is so basic, and so frequently commented upon,<sup>3</sup> that it is difficult today to think that even the most incompetent could do so innocently, unless possibly in a mild form that might be argued to be unintentional. The breach in this case, n.1, ante, was unmistakable and clear. Judicial censure, which might have softened the impact, was neither immediately, nor even ultimately, supplied. The Commonwealth, however, urges us to have in mind that our review is the narrow one of due process, and not the broad exercise of supervisory power that we would possess in regard to our own trial court. We realize this, and we are not surprised that research discloses no authority holding that personal endorsement of his case falling short of suggesting the prosecutor has access to undisclosed evidence, is of sufficient significance to violate due process. While, as the Massachusetts court pointed out, even a mere statement of opinion is unethical, a fact the jury unfortunately was not told, at least the jury knows that the prosecutor is an advocate and it may be expected, to some degree, to discount such remarks as seller's talk. We turn, accord-

<sup>3</sup> The Massachusetts court cited, "Am. Bar Assn. Canons of Professional Ethics, Canon 15. *Commonwealth v. Mercier*, 257 Mass. 353, 376-77. *Commonwealth v. Cooper*, 264 Mass. 368, 374. *Greenberg v. United States*, 280 F.2d 472, 474-475 (1st Cir.). *Harris v. United States*, 402 F.2d 656, 658-659 (D.C. Cir.)." 1972 Mass. A.S. at 1711. To this we might add *United States v. Cotter*, 1 Cir., 1970, 425 F.2d 450. For cases reversing at least partly in reliance on this ground, see *United States v. Puco*, 2 Cir., 1971, 436 F.2d 761; *Hall v. United States*, 5 Cir., 1969, 419 F.2d 582; *Adams v. State*, 1967, 280 Ala. 678, 198 So.2d 255; *People v. Alverson*, 1964, 60 Cal.2d 803, 36 Cal. Rptr. 479, 388 P.2d 711; *People v. Fuerbach*, 1966, 66 Ill. App. 2d 452, 214 N.E.2d 330; *Warmesley v. State*, 1960, 171 Neb. 197, 106 N.W.2d 22; *People v. Reimann*, 1943, 266 App. Div. 505, 42 N.Y.S.2d 599. For cases upholding the principle but refusing to reverse on the particular facts, see *United States v. Grooms*, 7 Cir., 1972, 454 F.2d 1308; *United States v. Jones*, D.C. Cir., 1970, 433 F.2d 1107; *Devine v. United States*, 10 Cir., 1968, 403 F.2d 93; *State v. Abney*, 1968, 103 Ariz. 294, 440 P.2d 914; *Cokley v. People*, 1969, 168 Colo. 52, 449 P.2d 824; *Thomas v. Commonwealth*, 1966, 207 Va. 459, 214 N.E.2d 330; *Embry v. State*, 1970, 46 Wis. 2d 151, 174 N.W.2d 521.



ingly, to defendant's second complaint, which we regard as more serious.

We have noted that when Gagliardi pleaded guilty and disappeared from the trial the jury was informed of the plea (although not of its precise character).<sup>4</sup> While this may be a questionable practice, the Commonwealth says with some force that the fact of the plea, standing alone, was not detrimental and might even be said to be beneficial to petitioner, particularly where the Commonwealth argued to the jury that Oreto and Gagliardi had been the ones to fire the fatal shots, so that petitioner was, at the most, an accomplice. Fairly obviously, the jury was going to believe that at least one of the persons in the car was guilty of murder. Possibly Gagliardi's plea increased petitioner's chances of being selected out. However, from this perhaps benign, and possibly helpful factor, the prosecuting attorney turned Gagliardi's plea into a telling stroke against petitioner.

A jury must always wonder to some extent why a defendant has not pleaded. When Gagliardi pleaded, drawing its attention to the matter at this important juncture, we may ask what conclusion the jury drew with respect to petitioner. There are only two alternatives. A defendant whose case reaches the jury has either not sought to plead, or he has sought to unsuccessfully. Equally, a jury must know that if he has not sought to plead, either he did not wish to plead, or he was deterred by the belief that the prosecutor would be unreceptive. In this case it was force-

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<sup>4</sup> Although it is not vital to the case, the inference that it was a plea to murder in the second degree seems inescapable. In the light of all the evidence and the fact that the victim had been shot three times in the ribs next to Gagliardi, with no significant defense, it would be difficult to think that the Commonwealth would accept a plea of manslaughter. Conversely, the jury could hardly think that Gagliardi would plead, after going through a trial, without some inducement. The most obvious one is the acceptance of a plea to murder in the second degree.

fully brought to its attention that the prosecutor was not unreceptive. What then?

It should require but little sophistication for a jury to realize that any defendant would seek to plead to whatever he considered the minimum possible verdict — there could be nothing to lose by not doing so. In the ordinary case, however, the jury has the full spectrum. Perhaps the defendant's hoped-for minimum is an acquittal. In this event he would not seek to plead. Maybe he is convinced that his best hope is for some intermediate verdict, in which case he would seek to plead to that, but the prosecutor has refused. The jury ordinarily does not know which, but the prosecutor knows, and the jury knows that he knows. Possibly his appraisal of petitioner's hope could have been regarded as mere (and fair) speculation if offered by someone who was ignorant of the true situation, but the prosecutor was a known insider. Viewed in the abstract, we might have been tempted to make the same observation. In the words of the French playwright, Moliere, "What the devil was he doing in that galley?" (Bartlett, *Familiar Quotations* (14th ed. 1968) p. 361). The prosecutor, however, was not speaking in the abstract. The question must be, would a jury, wondering whether petitioner was an active participant, or such small fry that the others were indifferent to his presence, be affected by a "frank" remark by one in a position to know what hopes petitioner had revealed to him? We think the answer is yes.

If there can be any doubt about that, (and there were twelve jurors to ponder, and to point out the significance) this is a first degree murder case, the situation was created by a deliberate, and as we shall see, doubly unwarranted, act of the prosecutor, and we believe that fundamental fairness requires that the doubt be resolved in favor of petitioner.

In discussing, and adopting, this likelihood of the jury's

inferring, from the prosecutor's statement, that petitioner had offered to plead, the Massachusetts dissenters stated that there was "nothing to suggest that the defendant or his attorney had at any time negotiated for a guilty plea or conceded the defendant's guilt." 1971 Mass. A.S. at 1720-21. It is our duty, on habeas corpus, not to leave important factual questions unresolved. 28 U.S.C. § 2254; *Fisher v. Scafati*, 1 Cir., 1971, 439 F.2d 307, 309. While on the record it seemed to us almost inescapable that petitioner could not have offered to plead, and yet unfair to draw that inference where there had been no finding, we proposed to counsel that they either stipulate to such fact, if there was no disagreement, or return, by order of court, to the district court for further findings.<sup>5</sup> As a result they stipulated as follows,

"[A]t no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial."

Accordingly we have before us a case where the prosecutor, despite the fact that it was totally untrue, strongly indicated to the jury that the defendant had offered to plead, something which, by the great weight of authority, the jury should not be told even when true.<sup>6</sup>

<sup>5</sup> In so doing we are not bypassing the important requirement of exhaustion of state remedies. We read the opinion of the Massachusetts court as, inferentially, declining to pursue this subject.

<sup>6</sup> The federal rule forbids the introduction of a withdrawn plea of guilty, *Kerceval v. United States*, 1927, 274 U.S. 220, and so do most states. E.g., *Ely v. Haugh*, Iowa, 1969, 172 N.W.2d 144; *State v. Joyner*, 1955, 228 La. 927, 84 So.2d 462; *People v. Street*, 1939, 288 Mich. 406, 284 N.W. 926; *State v. Reardon*, 1955, 245 Minn. 509, 73 N.W.2d 192; *People v. Spitaleri*, 1961, 9 N.Y.2d 168, 173 N.E.2d 35. *Contra*: *State v. Carta*, 1916, 90 Conn. 79, 96 A. 411; *State v. Nichols*, 1949, 167 Kan. 565, 207 P.2d 469 (dictum); *State v. Weekly*, Wash., 1952, 252 P.2d 246. The Massachusetts cases, e.g., *Commonwealth v. Devlin*, 1957, 335 Mass. 555, 573, deal with pleas to the maximum offense, and so do not reach the question of compromise. Whether the admission would

For a prosecutor to convey, or even to permit, a false impression, invades the area of due process. *Miller v. Pate*, 1967, 386 U.S. 1; *Hamric v. Bailey*, 4 Cir., 1967, 286 F.2d 390. It has been said that the more deliberate the intent, the greater the invasion. See *United States v. Mayersohn*, 2 Cir., 1971, 452 F.2d 521, 526; *United States v. Keogh*, 2 Cir., 1968, 391 F.2d 138, 146-47. We may now ask how a prosecutor who had given contemplative thought to the matter could honestly believe that a defendant who had seen his co-defendant who had fired the shots allowed to plead to second degree, but made no attempt to plead himself, was risking first degree simply in the hope of getting "something a little less." Whether wisely or not, petitioner must have been hoping for something a lot less. Even if the prosecutor's statement here were to be charged, charitably, to thoughtlessness, in a first degree murder case there must be some duty on a prosecutor to be thoughtful. Moreover, good faith is not determinative. As the Court pointed out in *Brady v. Maryland*, 1963, 373 U.S. 83, at 87, (a suppression of favorable evidence case, which the Court construes *pari passu* with affirmative falsity),

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violate constitutional standards is an open question. See *Hamilton v. California*, 1967, 389 U.S. 921. It was so held in *United States ex rel. Spears v. Rundle*, E.D.Pa., 1967, 268 F.Supp. 691. The weight of state authority similarly rejects evidence of unaccepted offers to plead. See, e.g., *State v. McGunn*, 1940, 208 Minn. 349, 294 N.W. 208; *Bennet v. Commonwealth*, 1930, 234 Ky. 333, 28 S.W.2d 24. *Contra*: *State v. Christian*, Mo., 1952, 245 S.W.2d 895. Singularly, in this area some federal cases favor admissibility. We find them unpersuasive. Thus in *Moreland v. United States*, 10 Cir., 1959, 270 F.2d 887, the court simply stated that while a civil offer of compromise was not an admission of liability, a compromise plea was. In *Christian v. United States*, 5 Cir., 1925, 8 F.2d 732, the court found a reason: an offer to compromise a crime was against public policy. The court, of course, lacked the instruction of *North Carolina v. Alford*, 1970, 400 U.S. 25, 37-38 (plea may be accepted even though defendant denies guilt). We think the better rule is expressed in *Ecklund v. United States*, 6 Cir., 1947, 159 F.2d 81, 84-85. See, also, Amer. Bar Ass'n Standards, Pleas of Guilty § 2.2 and § 3.4; Advisory Committee's Note to Rule 410, Proposed Rules of Evidence for the United States Courts.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

"The principle of *Mooney v. Holohan* [294 U.S. 103] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." See also *United States v. Giglio*, 1972, 405 U.S. 150, 153-54. When the prosecutor added his "frank" statement of petitioner's own position, his personal endorsement of petitioner's guilt acquired a substantial plus. While we regret to add to the Superior Court's docket, we cannot think that a defendant who never sought to plead and has had the prosecutor, in effect, testify in this manner has had a fair trial, or that the length of his argument, as suggested by Judge CAMPBELL, made the error harmless.

*Reversed and remanded for further proceedings consistent herewith.*

CAMPBELL, *Circuit Judge* (dissenting).

While the remarks made were improper and might warrant reversal in the exercise of our supervisory powers were this case to be before us upon appeal from a federal district court, I am unable to agree, especially when read in the context of the prosecutor's extended arguments, that they were either so meaningful or prejudicial as to amount to error of constitutional proportions. Admittedly the line between fundamental unfairness, in the due process sense, and a more tolerable species of unfairness, is a hard one to draw, and I can understand the majority's view that, in a capital trial, there is good reason to resolve doubts

for the defendant. Nonetheless, I think the inference to be drawn from the prosecutor's remarks is far less obvious than does the majority. As I am persuaded that the petitioner had a substantially fair, if less than perfect, trial, I would deny his petition.

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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT  
[Title Omitted in Printing]

JUDGMENT

Entered February 22, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is vacated and the case is remanded to that Court for further proceedings consistent with the opinion of the Court filed today. No costs.

By the Court:

(s) DANA H. GALLUP

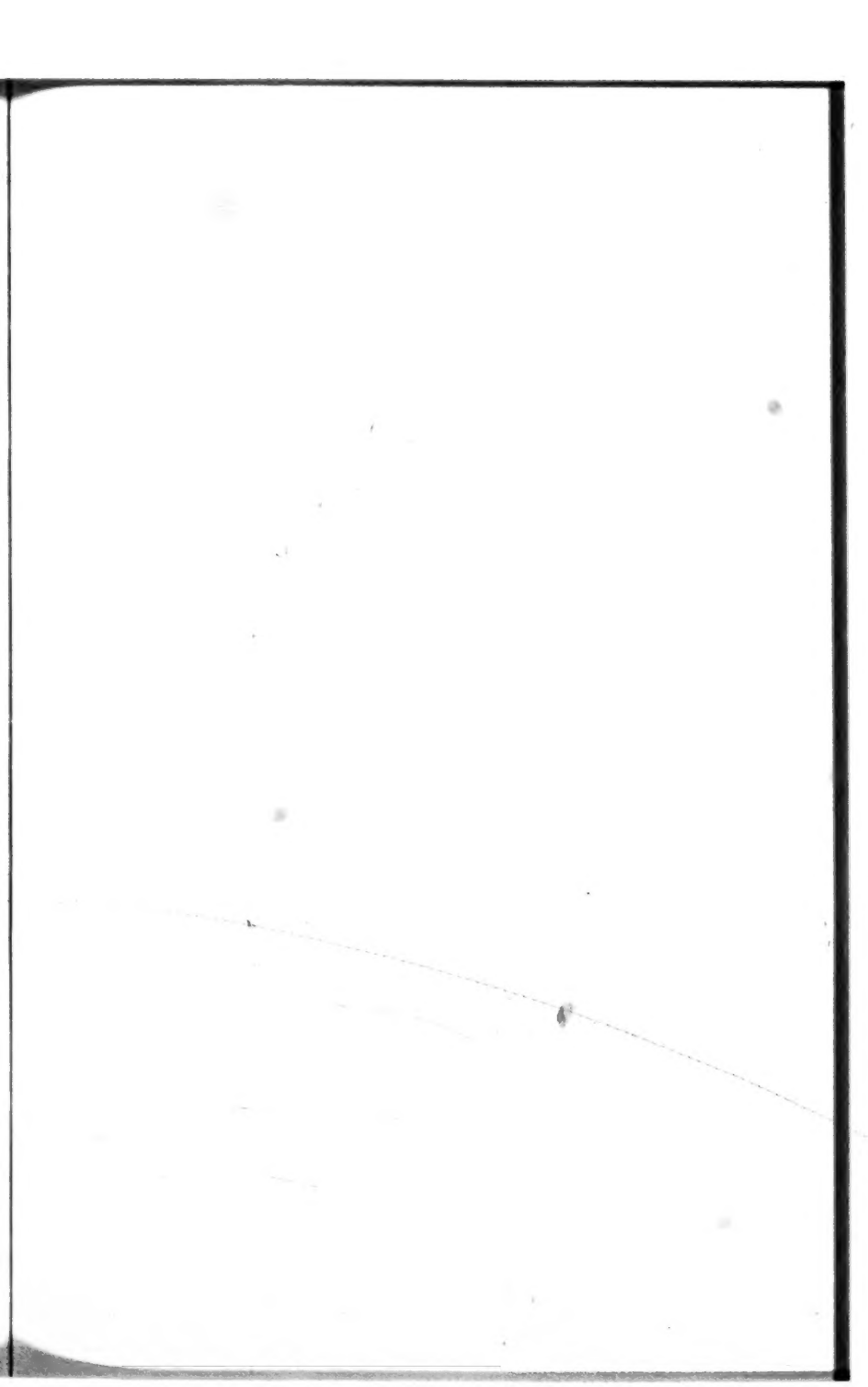
*Clerk*

Enter:

(s) ALDRICH, C.J.

[cc: Messrs. Smith and Mills.]

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In the  
Supreme Court of the United States

OCTOBER TERM, 1972

No. **72-1570**

ROBERT H. DONNELLY,  
PETITIONER,

v.

BENJAMIN A. DeCHRISTOFORO,  
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

ROBERT H. QUINN,  
*Attorney General*

JOHN J. IRWIN, JR.  
*Assistant Attorney General*  
*Chief, Criminal Division*

DAVID A. MILLS  
*Assistant Attorney General*  
*Chief, Criminal Appellate Section*

CHARLES E. CHASE  
*Assistant Attorney General*

*On the Brief:*

PATRICIA M. DINNEEN  
*Deputy Assistant Attorney General*



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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1972

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No.

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ROBERT H. DONNELLY,  
PETITIONER,

v.

BENJAMIN A. DeCHRISTOFORO,  
RESPONDENT.

---

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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**Opinions Below**

The opinion of the court below (App. A) is not yet reported. The order of the district court (App. B) is not reported. The opinion of the Massachusetts Supreme Judicial Court (App. C) is reported at 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 100 (1971).

**Jurisdiction**

The judgment of the court below was entered on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

### **Question Presented**

Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the Fourteenth Amendment to the Constitution?

### **Constitutional Provision**

#### **AMENDMENT XIV.**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Statement of the Case**

#### **A. *Proceedings in the State Courts***

On May 8, 1967, a Middlesex County grand jury returned two indictments against Respondent Benjamin A. DeChristoforo. Indictment number 77689 charged DeChristoforo with having committed murder in the first degree of one Joseph Lanzi. Indictment number 77690 charged DeChristoforo with illegal possession of a firearm. At respondent's arraignment on November 20, 1968, a plea of not guilty was entered in his behalf at the direction of the court. The trial of respondent commenced on April 22, 1969, and lasted seven days.

The first Commonwealth witness, Patrick Carr, a Med-



ford, Massachusetts police officer, testified that at approximately 4:00 a.m. on April 18, 1967, while accompanying Officer John P. Brady in a police cruiser, he observed an automobile with four occupants and approached it to investigate (Tr. 334-39)<sup>1</sup>; that the operator of the vehicle, one Gagliardi, stepped out as he (the witness) approached (Tr. 339); that a man, later identified as the deceased Lanzi, appeared to be asleep in the front passenger seat of the car with his head slumped back and to the left (Tr. 343); that Frank Oreto and the respondent were in the back seat of the car and that they each conversed with him (the witness) when they got out of the car (Tr. 356-58); that the respondent identified himself with a surname other than "DeChristoforo" (Tr. 359); that the respondent identified the man remaining in the vehicle (Lanzi) as "Johnny Simeone from Boston" (Tr. 359); that the respondent indicated that the man "sleeping" in the front seat had been "involved in a fight in a joint in Revere" and that they (the occupants of the car) were going to take the other occupant (the deceased Lanzi) to a hospital (Tr. 359).

Officer Carr testified further that DeChristoforo walked away from the car while Officer Brady shined a light into the car and reportedly observed a small derringer-type gun on the floor behind the driver's seat and a revolver on the seat where Frank Oreto had been seated previously (Tr. 359-60)<sup>2</sup>; that he (the witness) leaned into the car to examine the supposedly injured man and determined that he was bloody and not breathing; that Officer Brady likewise examined the man and determined that he was dead (Tr. 360-61). Frank Oreto was arrested at the scene (Tr. 361). (On October 26, 1967, Oreto, the only suspect then in custody, pleaded guilty to second degree murder and

<sup>1</sup> "Tr." refers to the State Trial Transcript.

<sup>2</sup> The guns were made exhibits in the case (Tr. 381-83).

illegal possession of a firearm. See 1971 Mass. Adv. Sh. 1708, App. C, p. 40).

On cross-examination Officer Carr testified that DeCristoforo had been seated behind the driver in the automobile and that Oreto had been seated behind the dead man (Tr. 399).

George Katsas, a pathologist, then testified that he had examined the victim's body and had extracted bullets therefrom at approximately 5:30 a.m. on April 18, 1967 (Tr. 457-61); that four bullets had been found in the victim's body (Tr. 465); that in his (the witness') opinion the victim, Lanzi, had died as a result of multiple gunshot wounds in the chest and head which perforated the brain, liver and lungs (Tr. 470); that smoke rings indicated that a gun was held close to, or in contact with, the clothing and body at the time of the shots (Tr. 474); that death had occurred between three and five o'clock in the morning (Tr. 476) and that, in his opinion, the victim had been shot to death in the automobile (Tr. 477).

On cross-examination, the witness testified further that it was his opinion that the body had not been moved after the shooting (Tr. 486).

Officer John P. Brady testified that he was the police officer who was with Officer Carr during the night in question; that he (the witness) saw an automobile go through a red light (Tr. 534); that the car contained four men and that the headlights on the car were off (Tr. 535-38); that he observed Gagliardi get out of the driver's door; that he heard Officer Carr converse with Gagliardi (Tr. 539-40) and that he walked to the rear of the car and heard a conversation between Officer Carr, Frank Oreto and the respondent, DeChristoforo.

William Modugno testified that he lived at 9 Fourth Street in Medford (previously established as in the area where the two police officers questioned the respondent)

and that, on July 25, 1967, he found a revolver buried in the backyard of his home (Tr. 590-91).<sup>3</sup>

Joan Griffin, the sister of the deceased, Joseph Lanzi, testified that she lived in the same building with her brother; that she had supper with him at 6:00 p.m. on the evening of April 17, 1967, and that she next saw his body at the Gaffy Funeral Home on April 18, 1967 (Tr. 606-608).

Walter Dello Russo testified that he was a bartender at the Attic Lounge in Boston; that DeChristoforo was his employer (Tr. 614-16); that Oreto was the manager of the cocktail lounge downstairs but worked in both places (Tr. 617-18); that he (the witness) knew the deceased Lanzi (Tr. 620); and, that both DeChristoforo and Oreto were in the Attic Lounge at two o'clock on the morning of April 18, 1967 (Tr. 624-25).

Susan Morrison, a secretary at Harvard University, testified that she saw DeChristoforo and Gagliardi at the Attic Lounge early in the morning on April 18, 1967 (Tr. 632-35).

William F. Cummings, a Massachusetts State Police ballisticsian, testified that he had received two weapons from the Medford Police on April 18, 1967, and had examined the same (Tr. 674-78); that he had examined bullets removed from the body of Joseph Lanzi and had performed tests thereon (Tr. 684-85); that, in his opinion, the bullet removed from Lanzi's head had been fired by the revolver that had been found on the back seat of the car (Tr. 688); and that, in his opinion, the three bullets taken from Lanzi's chest cavity had been fired from the gun previously identified as having been found buried in the backyard of William Modugno (Tr. 688, 693-97).

Edmund Flanagan, a special agent for the Federal Bureau of Investigation, testified that pursuant to the issu-

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<sup>3</sup> The weapon was introduced as an exhibit (Tr. 597).

ance of an unlawful flight warrant he had been involved in the nationwide search for DeChristoforo following the respondent's disappearance on April 18, 1967, and that DeChristoforo had been arrested finally on November 20, 1968, after an extensive investigation by the Federal Bureau of Investigation (Tr. 724-27).

Dennis M. Condon, also a special agent of the Federal Bureau of Investigation, testified as to his experiences attempting to apprehend Gagliardi, co-defendant of the respondent (Tr. 735-41). The trial judge gave a limiting instruction as to the effect of this testimony (Tr. 736) at the request of respondent's attorney (Tr. 275-77, 722).

Counsel for respondent thereupon proceeded to make an opening statement to the jury. During that address, counsel stated that evidence *would be offered* to show that the respondent had been in the car because it was a rainy night and he needed a ride home (Tr. 760); that evidence *would be offered* to establish that respondent's flight from the authorities could be explained on some ground other than "consciousness of guilt" (Tr. 760-61); that evidence *would be offered* to show that DeChristoforo "was only a passenger in an automobile where an incident took place over which he had no control and had no interest in, other than the death of his close friend" (Tr. 761).

The defense case-in-chief contained *no* evidence supportive of any of the above-cited contentions made by defense counsel in his opening statement.

Nevertheless, defense counsel reiterated in closing argument *his unsupported contentions* that the respondent was in the car simply for the purpose of getting a ride home (Tr. 880) and that the respondent's flight was consistent with something other than consciousness of guilt.

At the close of all of the evidence, while the jury was not present, the respondent's co-defendant, Gagliardi,

pleaded guilty to murder in the second degree (Tr. 851-52). After the jury returned, the court stated:

Mr. Foreman, and gentlemen of the jury, you have noted that the defendant Gagliardi is not in the dock. He has pleaded 'guilty' and his case has been disposed of. We will, therefore, go forward with the trial of the case of the Commonwealth v. DeChristoforo... (Tr. 851-52).

The trial judge was not requested, at that time, to instruct the jury that Gagliardi's plea should have no effect on its determination of the guilt or innocence of DeChristoforo; no instruction was requested then or given. The fact that the judge advised the jury of Gagliardi's guilty plea and the further fact that respondent's counsel did not request a jury instruction were consistent with respondent counsel's prior attempts to introduce into evidence an exhibit showing that Oreto had already pleaded guilty to the murder of Lanzi and had been sentenced to life imprisonment (Tr. 808, 810-813, 819-822, 825-826). On the question of the admissibility of the Oreto exhibit, respondent's counsel argued to the judge "Well, if the Commonwealth will say [that Oreto pleaded guilty to murder] for the record so that the jury will know it, I will have no quarrel...." (Tr. 820). "If I have an opportunity to prove that [DeChristoforo] didn't personally shoot [Lanzi], at least I can eliminate that from the thinking of the jury." (Tr. 820).

Among other things, respondent's counsel made the following statement in his closing argument:

There may have been any number of reasons why that man [DeChristoforo] ran away from that place. There was a vicious killing of his friend, and who is to say

that he wouldn't be next. And I submit to you, Mr. Foreman and members of the jury, he didn't go out and hide with hoodlums, he didn't go out and hide with racketeers, he went to his grandmother's house, and he stayed in his grandmother's house and he stayed there—and I submit you have a right to draw inferences that he stayed there out of fear, not out of fear of prosecution, but out of fear for other causes (Tr. 888).

... It is my function to attempt to call your attention to such matters that have developed during the course of the trial *as I feel will warrant, justify or require you* to return a verdict of not guilty (Tr. 854).

... What has been offered to get you to start thinking along the lines that Butch [i.e., respondent] and others decided they ought to kill this fellow, this friend of theirs? Nothing, of course. *There has been no evidence offered of any disputes here, of any fights, of any ill feeling, of any ill will* (Tr. 878-79).

... So that *I think* it's fair to say that the Commonwealth hasn't demonstrated any evidence that would warrant you to even consider the question as to *whether or not DeChristoforo actually pulled the trigger*.

In short, *I think that you would almost be compelled to come to the conclusion as reasonable people, that he wasn't the killer* (Tr. 874).

... When I say that it's serious, *I think it's serious only because I think that it creates doubts in your mind rather than creates affirmative evidence against him* (Tr. 876).



... [I]f there is a doubt in your mind about that, and *I believe there is, I represent and argue to you there is, I ask you to find him not guilty* (Tr. 890) (Emphasis added).

The prosecutor's closing argument followed. He began:

Let me preface my argument by saying that first of all I am aware that what I say really is an argument because the word "argument" presupposes that I am prejudiced to the cause that I represent, which of course I am. I think that the very nature of this system being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it.

I want you to be aware also that I understand completely that my argument is in no way evidence, all it is is an attempt, I suppose, to point out to you those things that I think are important in the case with reference to our responsibility and the burden of proof.

And I realize that my closing argument should be in no way considered by you as any evidence in the case, and I am sure that you won't consider it as that; as I am sure that my opening statement to you is in no way evidence in the case and won't be considered by you as evidence.

I think the important thing for me to say to you right now with reference to the opening I made to you, with reference to what we were going to prove: I hope that if there was anything in that opening that I said to you that we did not prove, that you will disregard what I said about it and only make your

decision on the evidence that we presented to you. I represent to you that whatever I said in the opening I honestly and honorably intended to prove at the time, and I suggest to you that for the most part we have done that without any fear of contradiction.

Let me say by way of getting into my argument that I am aware of what our burdens are in the courtroom, what the Commonwealth's burdens are, what our responsibilities are, and I am aware of the fact that because DeChristoforo has been indicted for the murder and arrested is no evidence of his guilt and I don't ask you to regard it as such. As a matter of fact, you can't. And I realize that our burden is to prove to you beyond any reasonable doubt his guilt." (Tr. 891-93).

The prosecutor then told the jury that the facts indicated that Gagliardi (the driver) shot Lanzi three times in the side and that Oreto shot Lanzi in the back of the head (Tr. 900). The prosecutor argued that DeChristoforo was guilty of murder because he was in the car as a confederate of Gagliardi and Oreto—prepared to assist them in any eventuality (Tr. 913).

During his lengthy closing argument, the prosecutor made the following remarks which have come under attack:

We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances . . . the defense seems to make some big issue of motive in this case in an attempt, I suppose, to have the jury feel, regardless of what instructions might be given by the court, that an absence of motive in a killing is something that is a detriment to the Commonwealth's case



and, therefore, you should sort of equate that to reasonable doubt and then acquit him . . . (Tr. 894).

No objection to the remark was made. Later, the prosecutor argued:

I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder . . . (Tr. 910).

An objection to the remark was sustained; the court indicated its agreement that the statement had been improper (Tr. 910. See also Tr. 931) 1971 Mass. Adv. Sh. at 1712 (App. C, p. 39). No specific curative instruction was requested immediately; no specific curative instruction was given at that time. [The trial judge later stated that had counsel so requested, he would have given such an instruction (Tr. 931).] Later, arguing to the jury, the prosecutor said:

I expect that you will return a verdict that is a reflection of the truth. I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way (Tr. 913).

No immediate objection was taken by respondent's counsel to this statement; nor was a specific curative instruction requested at that time. Rather, *on the following morning*, after respondent's counsel had reviewed his copy of the daily transcript, said counsel moved for a mistrial on the ground that the last two remarks quoted above had prejudiced his client. The motion was denied, to which denial

respondent's counsel excepted (Tr. 922). The judge went on to invite respondent's counsel to submit in writing whatever instructions counsel desired the judge to give to the jury in order to counter the alleged prejudicial effect of the prosecutor's remarks (Tr. 923-925).

Counsel for the respondent then wrote out and filed the following specific request for instructions:

In his closing argument to you, members of the jury, Mr. Irwin the assistant district attorney, stated with reference to the defense:

"I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope you find him guilty of something a little less than first-degree murder.

"(a) That statement was improper argument. There is no basis for that statement. The defendant has consistently maintained his innocence by virtue of his plea of not guilty as to any and all charges or accusations made against him.

"(b) As far as you are concerned the defendant is still presumed to be innocent of any and all charges before you.

"(c) You are to totally and completely eliminate from your minds any such suggestion or argument made by Mr. Erwin (sic), insofar as that is humanly possible and if you find that you cannot eliminate that from your consideration of the case then you are to inform the foreman of the fact.

"(d) I ask you now whether there is anyone on the jury who feels he cannot eliminate that from his deliberations and from his consideration of his decision in this case.

“(e) In again instruct you that you are to disregard that statement made by Mr. Erwin (sic) and consider this case as though no such statement was made.”

Immediately prior to the giving of the charge, respondent DeChristoforo exercised his right to make an unsworn statement to the jury (Tr. 933).<sup>4</sup> He stated that he had asked Gagliardi for a ride home; that on the way home an argument broke out of which he had no part; he saw Joseph Lanzi get shot; he couldn't stop it; he was afraid for his life (Tr. 934).

The trial judge proceeded to instruct the jury, at length. The remarks set out below were included in the court's final charge to the jury:

... Let me begin this charge by saying to you that, as I have said with regard to unsworn statements, not subject to cross-examination, of the defendant, it is not evidence, nor are arguments of counsel, nor the opening of counsel—whether it be the Assistant District Attorney in this case or whether it be Mr. Smith. It is not evidence for your consideration.

... The closing arguments, too, Madam and gentlemen of the jury, the counsel very often becomes overzealous. Closing arguments are not evidence for your consideration. Closing arguments, Madam and gentlemen, are merely statements by the respective counsel as to how they hope you will view the evidence which you have heard.

<sup>4</sup> Allowing a defendant in a capital case to make an unsworn statement to the jury had been a custom of long standing in Massachusetts. *Ferguson v. Georgia*, 365 U.S. 570, 586, fn. 17 (1961). A recent opinion of the Supreme Judicial Court, *Commonwealth v. O'Brien*, 1971 Mass. Adv. Sh. 1181, 271 N.E.2d 633 (1971), has apparently put an end to this anomalous practice.

Now, in his closing argument, the District Attorney, I noted, made a statement: "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." There is no evidence of that whatsoever, of course; of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement was made (Tr. 938-40).

On April 30, 1969, respondent was found guilty of murder in the first degree. It was recommended that the death penalty not be imposed. He was also found guilty of unlawful possession of a firearm (Tr. 1023-24, 1037). A life sentence was imposed as a result of the murder conviction. A sentence of not less than four years, nor more than five years, was imposed for the lesser conviction, to be served concurrently (Tr. 1037).

The respondent appealed to the Massachusetts Supreme Judicial Court, pursuant to Mass. Gen. Laws c. 278, §§ 33A-G. Additionally, respondent moved for a new trial in the Superior Court, claiming the denial of his constitutional rights as set forth herein. The motion was denied and, upon the respondent's exceptions, that denial became part of his appeal.

The Supreme Judicial Court solidly affirmed the judgment of the Superior Court by a majority vote. *Commonwealth v. DeChristoforo*, 1971 Mass. Adv. Sh. 1707, 277 N.E. 2d 100, (App. C).

#### B. *Proceedings in the Federal Courts*

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of

Massachusetts on July 7, 1972. Counsel agreed that no facts were in dispute and introduced into evidence the identical record that had been before the Massachusetts Supreme Judicial Court. By order dated September 27, 1972, the District Court judge denied the petition ruling that "the prosecutor's arguments were not so prejudicial as to deprive [DeChristoforo] of his constitutional rights to a fair trial." (App. B).

On February 22, 1973, by a two to one decision, the United States Court of Appeals for the First Circuit reversed the order of the District Court. (App. A).

### Argument

#### I. WHEN VIEWED IN THE CONTEXT OF THE ENTIRE TRIAL, THE PROSECUTOR'S CLOSING ARGUMENT DID NOT SO SERIOUSLY PREJUDICE THE RESPONDENT THAT HE WAS DEPRIVED THEREBY OF A FAIR TRIAL.

##### A. *The prosecutor's remarks during closing argument were, at most, statements of personal opinion based upon matters already before the jury and provoked by remarks made by the petitioner's counsel during opening and closing argument.*

The disputed remarks of the prosecutor were, at most statements of personal opinion based on matters already before the jury. For instance, the first disputed statement (Tr. 984) merely voiced a personal opinion as to the gravity of the crime before the jurors. The third disputed statement was to the effect that he (the prosecutor) honestly and sincerely believed that there was no doubt as to the guilt of DeChristoforo. It must be remembered that the evidence of the respondent's guilt included his presence in the car with the victim, his use of a false name, his false

identification of the victim, the false story which he had related to the police, his immediate flight and his prolonged concealment (Tr. 334-61, 724-27). Viewed against the background provided by such formidable evidence of guilt, it is apparent that the prosecutor's reference was, in each case, to the evidence already before the jurors. Similarly, the prosecutor's second disputed statement referred to his opinion as to the trial tactics employed by the respondent's counsel.

In order to understand further the context in which the disputed remarks were made, it is necessary to review the arguments of respondent's counsel which, it is suggested, provoked the disputed remarks. The respondent's counsel repeatedly asserted his own personal opinion. (See Tr. 854, 874, 876, 878-79, 890). Moreover, in his opening statement to the jury, the respondent's counsel stated that evidence would be offered to show that respondent had been in the car only because it was a rainy night and he needed a ride home (Tr. 760). No such evidence was produced. In addition, counsel stated that evidence would be offered to establish that the respondent's flight from authorities could be explained on some ground other than consciousness of guilt (Tr. 760-61). Again, no such evidence was produced. Finally, the respondent's counsel concluded his opening "statement" with the resounding promise that evidence would be offered to show that:

[T]his man was only a passenger in an automobile where an incident took place over which he had no control and had no interest in other than the death of his close friend ... (Tr. 761).

Once again, no such evidence was presented.

Nevertheless, respondent's counsel reiterated in his clos-



ing argument to the jury his contention that DeChristoforo was in the car simply for the purpose of getting a ride home (Tr. 880). In addition, he repeated his earlier unsupported argument that the respondent's flight was consistent with something other than consciousness of guilt. This time, however, he added a possible explanation—

[T]here may have been any number of reasons why that man ran away from that place. There was a vicious killing of his friend, and who is to say that he wouldn't be next. And I submit to you, Mr. Foreman and members of the jury, he didn't go out and hide out with hoodlums, he didn't go out and hide out with racketeers, he went to his grandmother's house, and he stayed in his grandmother's house and he stayed there—and *I submit you have a right to draw inferences that he stayed there out of fear, not out of fear of prosecution, but out of fear for other causes* (Tr. 888) (Emphasis added).

While so arguing, the respondent's counsel particularly stressed the good character of his client (Tr. 878-79) and coupled this contention with the argument that the Commonwealth had not shown any motive to murder the deceased:

[W]hat has been offered to you to get you to start thinking along the lines that Butch [DeChristoforo] and others decided they ought to kill this fellow, this friend of theirs? Nothing, of course. *There has been no evidence offered of any disputes here, of any fights, of any ill feeling, of any ill will.*

It is submitted that the above-quoted remarks made by counsel for the respondent in his opening statement and

closing argument were not supported by the evidence and were unethical. By promising that certain crucial evidence would be produced and then never producing the same, counsel used his opening and closing arguments as a substitute for evidence and tried to create the misimpression that "evidence" was available to support his claims. The practice engaged in by respondent's counsel has been soundly condemned. Moreover, when employed by a prosecutor, an opening statement of that character is fatally prejudicial. *Commonwealth v. Bearse*, 1970 Mass. Adv. Sh. 1643, 265 N.E.2d 496 (1970).

The disputed remarks of the prosecutor were to a large degree provoked by the remarks of respondent's counsel. Respondent's counsel's argument contended impliedly that, since his client was a man of good character and since the prosecutor had failed to offer evidence to show a motive, his client could not have committed a murder with the degree of malice aforethought required to support a conviction of murder in the first degree. Recognizing the transparent intentions of respondent's counsel, the prosecutor was forced to discuss "motive" as an issue when respondent's counsel well knew that "motive" was not a necessary element of proof. The injection of this non-issue precipitated the prosecutor's second disputed remark—the only remark to which respondent objected.

It is interesting to note that respondent's counsel only made one objection during the prosecutor's closing argument. The record reflects that counsel was well aware of the Massachusetts rule that objection must be made at the time of the remark in question. The next day, in the judge's chambers, when the prosecutor pointed out certain improprieties in respondent's counsel's closing argument, respondent's counsel retorted:



If I made an improper argument, the time to have raised that was at the time I was making it, by objection" (Tr. 927).

B. *The effect of the prosecutor's remarks, when viewed in the context of the entire case, was not so prejudicial as to require reversal.*

1. *The entire record of trial must be viewed to determine if the prosecutor's remarks tainted the jury's verdict.*

As noted by the Massachusetts Supreme Judicial Court in a recent opinion, "...it is not every impropriety that occurs in a trial that requires reversal." *Commonwealth v. Bottiglio*, 357 Mass. 593, 598 (1970). The overriding standard to be applied in determining whether an impropriety denied a fair trial is "whether the claimed defect influenced the jury and tainted its verdict. If the record demonstrates that it did not, then, the defendant is not entitled to a second trial." *Commonwealth v. Bottiglio*, *supra*, quoting from *People v. Kingston*, 8 N.Y.2d 384, 387. A prosecutor's argument must not be "unfair, prejudicial and unwarranted" or so appeal to passion or so abuse the defendant as to warrant the belief that prejudice resulted." *Commonwealth v. Dascalakis*, 246 Mass. 12, 27-28 (1923). Of course, it is always expected that opposing counsel will make reasonable objection and exceptions to any improper argument. *Id.*

In making its determination as to the prejudicial effect of the remarks on the verdict of the jury, this Court must view the case in its entirety as the Supreme Judicial Court of Massachusetts took pains to do. See 1971 Mass. Adv. Sh. at 1713, App. C, pp. 45-46.

2. *As a matter of Massachusetts law, the prosecutor's statements were not so improper as to require a reversal of conviction.*

As a matter of Massachusetts law, it is improper for counsel to make statements of personal belief to the jury. *Commonwealth v. Cooper*, 264 Mass. 368 (1928); *Commonwealth v. Mercier*, 257 Mass. 353, (1926). While the prosecutor's remarks in the instant case were thus improper, (as recognized by the Supreme Judicial Court) they do not warrant reversal of the respondent's conviction, inasmuch as Massachusetts does permit the use of otherwise improper statements by the prosecuting attorney, where provoked by statements made by defense counsel. *Commonwealth v. Smith*, 342 Mass. 180 (1961). Thus, where defense counsel directed the attention of the jury to the Commonwealth's failure to produce a prior criminal record of the defendant for impeachment purposes, the prosecutor was permitted to respond that the absence of such a record did not mean that there was no such record. *Commonwealth v. Smith*, *supra*; see also *Commonwealth v. Geagan*, 339 Mass. 487 (1959), *cert. denied* 361 U.S. 895 (Prosecutor was permitted to praise the F.B.I. where defense counsel had already strongly criticized it). In *Commonwealth v. Perry*, 254 Mass. 520 (1926), the Supreme Judicial Court stated:

The expressions of personal opinion were an answer to the challenge of the argument for the defendant, they were directed to that argument and they were accompanied by declarations that the jury were to consider the evidence without regard to the opinions and feelings of the speaker.

Language ought not to be permitted which is calculated by abusive epithets, vehement statements of per-

sonal opinion, or appeals to prejudice, to sweep jurors beyond a fair and calm consideration of the evidence. *Much, however, must be left to the discretion of the judge who has seen and heard the innumerable incidents of a trial where men are contending earnestly.* 254 Mass. at 530-31 (Emphasis added.)

In analyzing the effect of the prosecutor's remarks, particular stress must be placed upon the trial judge's curative instructions to the jury, given during his final charge. It is well settled that improper remarks by counsel may be cured by an appropriate instruction to the jury. *Commonwealth v. Balakin*, 356 Mass. 547 (1969); *Commonwealth v. Stout*, 356 Mass. 237 (1969); *Commonwealth v. Mercier*, 257 Mass. 353 (1926). Such curative instructions have, of course, been utilized and, depending upon the circumstances of the case, been deemed to be adequate, not only in Massachusetts courts but in the federal courts as well. See *Baiocchi v. United States*, 333 F.2d 32, 38 (5th Cir. 1964); *Homan v. United States*, 279 F.2d 767 (8th Cir.), cert. denied, 364 U.S. 866 (1966); *Painten v. Commonwealth*, 252 F. Supp. 851 (D. Mass. 1966).

The instructions given by the trial judge in the instant case were completely adequate to remove any residual prejudicial effect of the prosecutor's remarks. The trial judge repeatedly impressed upon the jurors the importance of proof beyond a reasonable doubt and the presumption of innocence (T. 951-59). He was careful to caution the jurors that they were the sole judges of the facts (Tr. 943-45). He gave the following instruction, taken essentially verbatim from the instructions given to the jurors at the time they were being selected:

It is your sacred duty, madam and gentlemen, to stand between the Commonwealth and this defendant with

unbending impartiality and unflinching courage in order that the truth may be established and thereby justice obtain (Tr. 949). (See also Tr. 130).

With respect to the remarks made by the prosecutor during his closing argument, the trial judge emphasized that such arguments were not evidence (Tr. 938-40). He explicitly directed the jurors to disregard the prosecutor's second disputed remark and to "[c]onsider the case as though no such statement was made" (Tr. 939-40); this second remark was the only comment which had been objected to immediately by respondent's counsel. On appeal, the Supreme Judicial Court noted that it was quite satisfied with the trial judge's decision to rely on curative instructions to erase any impropriety. The Court held that "[t]he judge adequately guarded the defendant's rights in each instance." 1971 Mass. Adv. Sh. at 1712-1713, App. C, p. 44.

Finally, as the Supreme Judicial Court noted, when counsel for the respondent objected immediately after the prosecutor's second disputed remark, the objection was in effect sustained. *Id.* at 1712. (App. C, p. 44). Later, the trial judge "explicitly stated that he would have given immediate instruction to the jury to disregard the comment if defense counsel had asked for one." *Id.* However, no such motion was made. Additionally, no objection was made immediately after the prosecutor's third disputed remark and no curative instruction was requested at that time.

Therefore, under the law of Massachusetts, it is clear that, although the prosecutor's remarks were improper, when viewed in the context of the entire record, in particular the provocative remarks made by opposing counsel and the curative instructions given by the court, they were not so prejudicial as to require a reversal by the respondent's conviction.

3. *The Massachusetts courts, by applying the law of Massachusetts in their determination of this issue, did not render the state proceedings fundamentally unfair.*

The Supreme Judicial Court of Massachusetts properly applied the controlling *Massachusetts* law in making its determination as to whether the prejudice allegedly suffered by respondent required reversal of the judgments of conviction. The instant petition presents the question of whether a state court in failing to grant a new trial to a defendant in a state prosecution committed an error of *constitutional* proportions. It has long been recognized that:

[t]he Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . .

Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to . . . be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see also *Coggins v. O'Brien*, 188 F.2d 130 (1st Cir. 1951).

The case of *United States ex rel. Castillo v. Fay*, 350 F.2d 400 (2nd Cir. 1965), *cert. denied*, 382 U.S. 1019 (1966), is illustrative of a situation wherein this distinction was of central importance. In *Fay*, although determining that certain remarks made by the prosecutor in his summation had been improper, the Second Circuit, nevertheless, held that the state error, if any, in not granting a new trial fell short of constituting a deprivation of due process of law.

*Id.* See also *Higgins v. Wainwright*, 424 F.2d 177 (5th Cir.), *cert. denied*, 400 U.S. 905 (1970); *Downie v. Burke*, 408 F.2d 343 (7th Cir. 1969), *cert. denied*, 395 U.S. 940; *Chavez v. Dickson*, 280 F.2d 727 (9th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961). The rationale underlying decisions such as *Fay* is readily apparent. While it is highly proper for a federal court to vindicate rights under the federal constitution where it appears that such rights have been abridged, the concept of due process may not be used as a vehicle for imposing federally preferred procedural rules upon state tribunals. See *Snyder v. Massachusetts*, *supra*; *Coggins v. O'Brien*, *supra*; *Soulia v. O'Brien*, 94 F. Supp. 764 (D. Mass. 1950), *aff'd*, 188 F.2d 233, *cert. denied*, 341 U.S. 928 (1951).

Therefore, absent a strong showing that the requirements of the Due Process Clause of the Fourteenth Amendment require a more stringent review of the ultimate effect of the prosecutor's allegedly prejudicial remarks than was conducted by the highest Massachusetts appellate court, the Supreme Judicial Court opinion should be binding. No such showing has been made.

C. *The First Circuit Court Opinion does not withstand factual analysis and is violative of the principles of comity and federalism that underlie the federal habeas corpus statute.*

Respondent's counsel's trial strategy was to show DeChristoforo to be an "innocent bystander" to a murder. Counsel was careful to mention in his closing that Gagliardi had pleaded guilty to the murder of Lanzi (Tr. 868-69; he also went to great pains to convince the jury that the people pulling the triggers were Gagliardi and Oreto—not DeChristoforo (Tr. 867-875).

The prosecutor in his turn conceded that Gagliardi and Oreto did the shooting (Tr. 900).

How then can the First Circuit Court conclude that the prosecutor attempted to convey to the jury that DeChristoforo had offered to plead guilty but the prosecution had refused the offer. It makes not a whit of sense to accept a plea of guilty from a co-defendant who had shot the victim and refuse a plea from another defendant who admittedly did not shoot the victim. What had been rejected by the Supreme Judicial Court as "subtle inferences" (App. C, p. 46) somehow became convoluted conclusions in the First Circuit Court.

The record before both courts was identical. It consisted of the pleadings and a transcript of all trial court proceedings. No facts were in dispute in either court. In terms of sheer numbers—the respondent received a fair trial. Eight jurists have so held (the trial judge, five judges of the Supreme Judicial Court, the federal district court judge and one Court of Appeals judge). Four judges have disagreed (two judges of the Supreme Judicial Court and two judges of the Federal Court of Appeals). In these circumstances the following question from *Brooks v. State of Texas*, 256 F. Supp. 807, 811 (N.D. Texas, 1966) seems singularly apt:

Five lawyers are of equal rank, each by reputation regarded as a topflight man of the profession. By selection they are called to the bench: Adams as trial judge in the federal court; Baker as trial judge in the state court; Smith, Jones and Brown become members of Court of Criminal Appeals. Toledo is tried and convicted in state court of cattle theft. And standing condemned in the state courts he turns to the federal



court with a petition for habeas corpus. The federal district judge and the four state judges are equal in knowledge of the law, but Judge Adams says to Toledo, "I will set you free. Judge Baker and these appellate judges cannot peer into the record for the truth as I can. They are not endowed with the legal mind to do so as a federal judge like I can."

No one contends that the Massachusetts Supreme Judicial Court used an incorrect legal standard in determining that DeChristoforo had received a constitutionally fair trial. That Court applied the proper legal principles to the facts before it. Of course, it is recognized that, in a federal habeas corpus proceeding, federal court judges are not bound by conclusions of state courts on questions of federal constitutional law—even where the facts are not in dispute. Nevertheless, the notions of comity and "federalism" that permeate the federal habeas corpus statute would seem to demand that in the circumstances of this case some deference should be given to the opinion of the Supreme Judicial Court. Cf. *United States ex rel. Harris v. State of Illinois*, 457 F.2d 191, 197 (7th Cir. 1972). This is certainly the position expressed by Circuit Judge Campbell in his dissent (App. A, p. 35).

But the majority of the First Circuit Court was obviously unwilling to grant any consideration to the opinion of the Supreme Judicial Court. The petitioner suggests that the majority of the First Circuit Court strained in constructing a doubt about the fairness of respondent's trial. And, the petitioner suggests further that the First Circuit Court has ignored the good faith allegiance that state court judges pledge to a vigorous enforcement of the United States Constitution—even in their own courts.



**Conclusion**

For the reasons stated above, it is respectfully submitted that the question presented for review is substantial, and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CHARLES E. CHASE  
*Assistant Attorney General*

*On the Brief:*

PATRICIA M. DINNEEN  
*Deputy Assistant Attorney General*

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## APPENDIX A

# United States Court of Appeals For the First Circuit

No. 72-1338

BENJAMIN A. DeCHRISTOFORO,

PETITIONER, APPELLANT,

v.

ROBERT H. DONNELLY,

RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Before

ALDRICH, McENTEE and CAMPBELL,  
*Circuit Judges.*

*Paul T. Smith*, with whom *Harvey R. Peters* and *Jeffrey M. Smith* were on brief, for appellant.

*David A. Mills*, Assistant Attorney General, Chief, Appellate Section, with whom *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, and *William T. Harrod, III*, were on brief, for appellee.

February 22, 1973

ALDRICH, *Senior Judge.* At four o'clock on the morning of April 18, 1967, the police drew alongside a car that had stopped in a residential area to question the four occupants. The driver, one Gagliardi, was questioned first. He left to enter a house, which he incorrectly asserted to be his own. Petitioner DeChristoforo was questioned next. After he had left the scene, ostensibly to join Gagliardi, the police discovered that the passenger in the front seat was not asleep, as they had been told, but dead. He had been shot in the head by a revolver found on the floor behind him

in front of the fourth passenger, Oreto, and in the left side, next to the driver, by a revolver later found buried in the vicinity. To complete the picture, a fully loaded derringer—a small weapon of low power—was found on the floor in front of the seat behind the driver, where petitioner had been sitting. Further facts, to the extent relevant, will be mentioned later. Others may be found in the opinion of the Supreme Judicial Court dismissing petitioner's appeal. *Commonwealth v. DeChristoforo*, 1971 Mass. A.S. 1707.

Petitioner's absence to seek Gagliardi was extended for some fifteen months, when petitioner was discovered to have been living at his grandmother's house. Eventually he, together with Gagliardi, Oreto having previously pleaded to second degree murder and a weapons charge, were brought to trial. At the close of the evidence, in the absence of the jury, Gagliardi pleaded guilty to murder in the second degree. The trial continued and petitioner was found guilty of first-degree murder, but with a recommendation that the death penalty be not imposed. His appeal was submitted to the full Court, but failed by a vote of 5-2. Thereafter petitioner sought a writ of habeas corpus in the district court. The case is here, on the state court transcript, on an appeal from an order dismissing the petition.

We are concerned solely with what petitioner claims was improper closing argument by the prosecuting attorney. The Massachusetts court was unanimous that the argument was improper, but divided on the issue of its prejudicial effect. The objectionable statements fall into two categories: the prosecutor's forceful expression of his personal belief in petitioner's guilt,<sup>1</sup> and his opinion that even petitioner expected a conviction.<sup>2</sup>

<sup>1</sup> "I honestly and sincerely believe that there is no doubt in this case; none whatsoever."

<sup>2</sup> "I quite frankly think that they [petitioner and his counsel] hope you find him guilty of something a little less than first degree murder."

The impropriety of a prosecutor adding the weight of his personal opinion of a defendant's guilt to the scales of justice is so basic, and so frequently commented upon,<sup>3</sup> that it is difficult today to think that even the most incompetent could do so innocently, unless possibly in a mild form that might be argued to be unintentional. The breach in this case, n.1, ante, was unmistakable and clear. Judicial censure, which might have softened the impact, was neither immediately, nor even ultimately, supplied. The Commonwealth, however, urges us to have in mind that our review is the narrow one of due process, and not the broad exercise of supervisory power that we would possess in regard to our own trial court. We realize this, and we are not surprised that research discloses no authority holding that personal endorsement of his case falling short of suggesting the prosecutor has access to undisclosed evidence, is of sufficient significance to violate due process. While, as the Massachusetts court pointed out, even a mere statement of opinion is unethical, a fact the jury unfortunately

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<sup>3</sup> The Massachusetts court cited, "Am. Bar Assn. Canons of Professional Ethics, Canon 15. *Commonwealth v. Mercier*, 257 Mass. 353, 376-77. *Commonwealth v. Cooper*, 264 Mass. 368, 374. *Greenberg v. United States*, 280 F.2d 472, 474-475 (1st Cir.). *Harris v. United States*, 402 F.2d 656, 658-659 (D.C. Cir.)." 1972 Mass. A.S. at 1711. To this we might add *United States v. Cotter*, 1 Cir., 1970, 425 F.2d 450. For cases reversing at least partly in reliance on this ground, see *United States v. Puco*, 2 Cir., 1971, 436 F.2d 761; *Hall v. United States*, 5 Cir., 1969, 419 F.2d 582; *Adams v. State*, 1967, 280 Ala. 678, 198 So.2d 255; *People v. Alverson*, 1964, 60 Cal.2d 803, 36 Cal. Rptr. 479, 388 P.2d 711; *People v. Fuerbach*, 1966, 66 Ill. App. 2d 452, 214 N.E.2d 330; *Wamsley v. State*, 1960, 171 Neb. 197, 106 N.W.2d 22; *People v. Reimann*, 1943, 266 App. Div. 505, 42 N.Y.S.2d 599. For cases upholding the principle but refusing to reverse on the particular facts, see *United States v. Grooms*, 7 Cir., 1972, 454 F.2d 1308; *United States v. Jones*, D.C. Cir., 1970, 433 F.2d 1107; *Dévine v. United States*, 10 Cir., 1968, 403 F.2d 93; *State v. Abney*, 1968, 103 Ariz. 294, 440 P.2d 914; *Cokley v. People*, 1969, 168 Colo. 52, 449 P.2d 824; *Thomas v. Commonwealth*, 1966, 207 Va. 459, 214 N.E.2d 330; *Embry v. State*, 1970, 46 Wis. 2d 151, 174 N.W.2d 521.

was not told, at least the jury knows that the prosecutor is an advocate and it may be expected, to some degree, to discount such remarks as seller's talk. We turn, accordingly, to defendant's second complaint, which we regard as more serious.

We have noted that when Gagliardi pleaded guilty and disappeared from the trial the jury was informed of the plea (although not of its precise character).<sup>4</sup> While this may be a questionable practice, the Commonwealth says with some force that the fact of the plea, standing alone, was not detrimental and might even be said to be beneficial to petitioner, particularly where the Commonwealth argued to the jury that Oreto and Gagliardi had been the ones to fire the fatal shots, so that petitioner was, at the most, an accomplice. Fairly obviously, the jury was going to believe that at least one of the persons in the car was guilty of murder. Possibly Gagliardi's plea increased petitioner's chances of being selected out. However, from this perhaps benign, and possibly helpful factor, the prosecuting attorney turned Gagliardi's plea into a telling stroke against petitioner.

A jury must always wonder to some extent why a defendant has not pleaded. When Gagliardi pleaded, drawing its attention to the matter at this important juncture, we may ask what conclusion the jury drew with respect to petitioner. There are only two alternatives. A defendant whose case reaches the jury has either not sought to plead, or he has sought to unsuccessfully. Equally, a jury must

<sup>4</sup> Although it is not vital to the case, the inference that it was a plea to murder in the second degree seems inescapable. In the light of all the evidence and the fact that the victim had been shot three times in the ribs next to Gagliardi, with no significant defense, it would be difficult to think that the Commonwealth would accept a plea of manslaughter. Conversely, the jury could hardly think that Gagliardi would plead, after going through a trial, without some inducement. The most obvious one is the acceptance of a plea to murder in the second degree.

know that if he has not sought to plead, either he did not wish to plead, or he was deterred by the belief that the prosecutor would be unreceptive. In this case it was forcefully brought to its attention that the prosecutor was not unreceptive. What then?

It should require but little sophistication for a jury to realize that any defendant would seek to plead to whatever he considered the minimum possible verdict—there could be nothing to lose by not doing so. In the ordinary case, however, the jury has the full spectrum. Perhaps the defendant's hoped-for minimum is an acquittal. In this event he would not seek to plead. Maybe he is convinced that his best hope is for some intermediate verdict, in which case he would seek to plead to that, but the prosecutor has refused. The jury ordinarily does not know which, but the prosecutor knows, and the jury knows that he knows. Possibly his appraisal of petitioner's hopes could have been regarded as mere (and fair) speculation if offered by someone who was ignorant of the true situation, but the prosecutor was a known insider. Viewed in the abstract, we might have been tempted to make the same observation. In the words of the French playwright, Moliere, "What the devil was he doing in that galley?" (Bartlett, *Familiar Quotations* (14th ed. 1968) p. 361). The prosecutor, however, was not speaking in the abstract. The question must be, would a jury, wondering whether petitioner was an active participant, or such small fry that the others were indifferent to his presence, be affected by a "frank" remark by one in a position to know what hopes petitioner had revealed to him? We think the answer is yes.

If there can be any doubt about that, (and there were twelve jurors to ponder, and to point out the significance) this is a first degree murder case, the situation was created by a deliberate, and as we shall see, doubly unwarranted, act of the prosecutor, and we believe that fundamental

fairness requires that the doubt be resolved in favor of petitioner.

In discussing, and adopting, this likelihood of the jury's inferring, from the prosecutor's statement, that petitioner had offered to plead, the Massachusetts dissenters stated that there was "nothing to suggest that the defendant or his attorney had at any time negotiated for a guilty plea or conceded the defendant's guilt." 1971 Mass. A.S. at 1720-21. It is our duty, on habeas corpus, not to leave important factual questions unresolved. 28 U.S.C. § 2254; *Fisher v. Scafati*, 1 Cir., 1971, 439 F.2d 307, 309. While on the record it seemed to us almost inescapable that petitioner could not have offered to plead, and yet unfair to draw that inference where there had been no finding, we proposed to counsel that they either stipulate to such fact, if there was no disagreement, or return, by order of court, to the district court for further findings.<sup>5</sup> As a result they stipulated as follows,

"[A]t no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial."

Accordingly we have before us a case where the prosecutor, despite the fact that it was totally untrue, strongly indicated to the jury that the defendant had offered to plead, something which, by the great weight of authority, the jury should not be told even when true.<sup>6</sup>

<sup>5</sup> In so doing we are not bypassing the important requirement of exhaustion of state remedies. We read the opinion of the Massachusetts court as, inferentially, declining to pursue this subject.

<sup>6</sup> The federal rule forbids the introduction of a withdrawn plea of guilty, *Kerceval v. United States*, 1927, 274 U.S. 220, and so do most states. E.g., *Ely v. Haugh*, Iowa, 1969, 172 N.W.2d 144; *State v. Joyner*, 1955, 228 La. 927, 84 So.2d 462; *People v. Street*, 1939, 288 Mich. 406, 284 N.W. 926; *State v. Reardon*, 1955, 245 Minn. 509, 73 N.W.2d 192; *People v. Spitaleri*, 1961, 9 N.Y.2d 168, 173 N.E.2d 35. *Contra: State v. Carta*, 1916, 90 Conn. 79, 96 A. 411; *State v. Nichols*, 1949, 167 Kan. 565, 207 P.2d 469

For a prosecutor to convey, or even to permit, a false impression, invades the area of due process. *Miller v. Pate*, 1967, 386 U.S. 1; *Hamric v. Bailey*, 4 Cir., 1967, 386 F.2d 390. It has been said that the more deliberate the intent, the greater the invasion. See *United States v. Mayersohn*, 2 Cir., 1971, 452 F.2d 521, 526; *United States v. Keogh*, 2 Cir., 1968, 391 F.2d 138, 146-47. We may now ask how a prosecutor who had given contemplative thought to the matter could honestly believe that a defendant who had seen his co-defendant who had fired the shots allowed to plead to second degree, but made no attempt to plead himself, was risking first degree simply in the hope of getting "something a little less." Whether wisely or not, petitioner must have been hoping for something a lot less. Even if the prosecutor's statement here were to be charged, charitably, to thoughtlessness, in a first degree murder case there must be some duty on a prosecutor to be thoughtful. Moreover, good faith is not determinative. As the

(dictum); *State v. Weekly*, Wash., 1952, 252 P.2d 246. The Massachusetts cases, e.g., *Commonwealth v. Devlin*, 1957, 335 Mass. 555, 573, deal with pleas to the maximum offense, and so do not reach the question of compromise. Whether the admission would violate constitutional standards is an open question. See *Hamilton v. California*, 1967, 389 U.S. 921. It was so held in *United States ex rel. Spears v. Rundle*, E.D.Pa., 1967, 268 F.Supp. 691. The weight of state authority similarly rejects evidence of unaccepted offers to plead. See, e.g., *State v. McGunn*, 1940, 208 Minn. 349, 294 N.W. 208; *Bennet v. Commonwealth*, 1930, 234 Ky. 333, 28 S.W.2d 24. *Contra: State v. Christian*, Mo., 1952, 245 S.W.2d 895. Singularly, in this area some federal cases favor admissibility. We find them unpersuasive. Thus in *Moreland v. United States*, 10 Cir., 1959, 270 F.2d 887, the court simply stated that while a civil offer of compromise was not an admission of liability, a compromise plea was. In *Christian v. United States*, 5 Cir., 1925, 8 F.2d 732, the court found a reason: an offer to compromise a crime was against public policy. The court, of course, lacked the instruction of *North Carolina v. Alford*, 1970, 400 U.S. 25, 37-38 (plea may be accepted even though defendant denies guilt). We think the better rule is expressed in *Ecklund v. United States*, 6 Cir., 1947, 159 F.2d 81, 84-85. See, also, Amer. Bar Ass'n Standards, Pleas of Guilty § 2.2 and § 3.4; Advisory Committee's Note to Rule 410, Proposed Rules of Evidence for the United States Courts.



Court pointed out in *Brady v. Maryland*, 1963, 373 U.S. 83, at 87, (a suppression of favorable evidence case, which the Court construes *pari passu* with affirmative falsity),

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

“The principle of *Mooney v. Holohan* [294 U.S. 103] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.”

See also *United States v. Giglio*, 1972, 405 U.S. 150, 153-54. When the prosecutor added his “frank” statement of petitioner’s own position, his personal endorsement of petitioner’s guilt acquired a substantial plus. While we regret to add to the Superior Court’s docket, we cannot think that a defendant who never sought to plead and has had the prosecutor, in effect, testify in this manner has had a fair trial, or that the length of his argument, as suggested by Judge CAMPBELL, made the error harmless.

*Reversed and remanded for further proceedings consistent herewith.*

CAMPBELL, *Circuit Judge* (dissenting).

While the remarks made were improper and might warrant reversal in the exercise of our supervisory powers were this case to be before us upon appeal from a federal district court, I am unable to agree, especially when read in the context of the prosecutor’s extended argument, that they were either so meaningful or prejudicial as to amount to error of constitutional proportions. Admittedly the line between fundamental unfairness, in the due process sense, and a more tolerable species of unfairness, is a hard one

to draw, and I can understand the majority's view that, in a capital trial, there is good reason to resolve doubts for the defendant. Nonetheless, I think the inference to be drawn from the prosecutor's remarks is far less obvious than does the majority. As I am persuaded that the petitioner had a substantially fair, if less than perfect, trial, I would deny his petition.

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## APPENDIX B

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 72-96-G

BENJAMIN A. DeCHRISTOFORO,  
PETITIONER,

v.

ROBERT H. DONNELLY,  
RESPONDENT.ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS

September 27, 1972

GARRITY, J. Upon consideration of the petition and the Magistrate's memorandum and the briefs of the parties, and after hearing, the court rules that, with respect to the first contention of the petitioner, the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial. With respect to the second contention, viz., that the trial judge's refusal to permit petitioner to inspect the grand jury testimony of officer Carr deprived him of a fair trial, the court finds that the petitioner has not exhausted available state remedies, 28 U.S.C. § 2254(b). *Picard v. Connor*, 1971, 404 U.S. 270. The opinion of the Supreme Judicial Court of Massachusetts, in affirming the judgment of conviction against the petitioner, indicated a method whereby petitioner could, by moving in the trial court for a new trial, have presented the Supreme Judicial Court with a record incorporating the relevant grand jury testimony. *Commonwealth v. De-Christoforo*, 1971 Mass. Adv. Sh. 1707, 1710-11 n. 2. At oral argument on this petition, counsel for petitioner asserted that, pursuant to this suggestion, he had moved the trial

court for a new trial in an attempt to have the grand jury testimony incorporated into the record; apparently the trial judge, however, merely read the testimony himself and, concluding that its production would not have benefited the petitioner, he refused to so incorporate the testimony. Our reading of the Supreme Judicial Court's opinion indicates to us that, if petitioner appeals the trial judge's decision, the appellate court may remand the case with a direction that the testimony be incorporated.\* Therefore it is ordered that the petition be denied without prejudice to petitioner's rights after exhaustion of available state remedies.

(s) W. ARTHUR GARRITY, JR.  
*United States District Judge*

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\* Cf. *United States v. LaVallee*, 2 Cir., 1965, 344 F.2d 313, 315, "It could be argued with some force that when the grand jury testimony is exculpatory and the trial testimony inculpatory, or even when both are inculpatory but so inconsistent as to cast serious doubt on the veracity of the witness, failure to make the grand jury testimony available on request is within the principle of decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense."

## APPENDIX C

## SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* BENJAMIN A. DE CHRISTOFORO

Middlesex. January 4, 1971. — December 7, 1971.

Present: TAURO, C.J., CUTTER, SPIEGEL, REARDON, QUIRICO,  
BRAUCHER, & HENNESSEY, JJ.

*Practice, Criminal*, Disclosure of evidence before grand jury, Argument by prosecutor, Mistrial, Judicial discretion, Charge to jury, Requests, rulings and instructions, Capital case, Fair trial, New trial. *Error*, Whether error harmful. *Constitutional Law*, Due process of law.

Indictments tried in the Superior Court before Sullivan, J.

REARDON, J. This is an appeal by the defendant under G. L. c. 278, §§ 33A-33G, from his conviction for first degree murder in the Superior Court. The jury, which unanimously recommended that the death penalty not be imposed, also found the defendant guilty of illegal possession of firearms. The case comes to us on a transcript of the proceedings below, a summary of the record, and the defendant's assignment of errors.

The following facts are undisputed. About 3:55 a.m. on April 18, 1967, a car in which the defendant and three others were riding was stopped in Medford by two police officers. Shortly thereafter the officers discovered that the occupant of the right hand side of the front seat was dead, having been shot once in the right side of the head and three times in the left side of the chest. The officers also discovered an unfired derringer on the floor of the car behind the driver's seat, and a .38 special caliber Smith & Wesson revolver, which had been fired once, on the rear right hand seat. A pathologist later estimated that the

deceased, identified as Joseph Lanzi, died in the car sometime between 3 and 4 a.m. from the wounds described above. The head wound had been inflicted by the Smith & Wesson revolver and the chest wounds by a Harrington & Richardson revolver which was discovered sometime afterward buried in the vicinity of where the car stopped. Before the officers' suspicions were aroused, however, both the defendant, who had been sitting behind the driver in the back seat, and the driver, one Carmen Gagliardi, had left the scene. The other occupant, Frank Oreto, was arrested by the officers after their discovery that the fourth man in the car was dead.

Indictments for murder in the first degree and illegal possession of firearms were returned against Gagliardi, Oreto, and the defendant. On October 26, 1967, Oreto, the only one in custody, pleaded guilty to second degree murder and the gun charges. The defendant, against whom an F.B.I. warrant for unlawful flight was lodged in April, 1967, was apprehended by the F.B.I. in November, 1968, at his grandmother's house, where he had been living continuously since the incident. Gagliardi and the defendant were brought to trial together but only the defendant's case went to the jury. At the conclusion of all the evidence Gagliardi pleaded guilty to second degree murder and the firearms charges, and his pleas were accepted.

The Commonwealth, conceding that it was the other two occupants of the car who fired the actual shots, relied on circumstantial evidence to connect De Christoforo in a joint venture with them to kill Lanzi. Evidence was introduced through Officer Carr, one of the two policemen who stopped the car, that the defendant gave a false name when they asked his identity. He also allegedly told them that the man in the front seat, whom the officers at first thought was asleep, was named "Johnny Simeone," that he had been involved in a fight in Revere and that they

were taking him to the hospital. The defendant's immediate flight from the authorities and subsequent concealment was cited by the prosecution as evidence of guilt.

In addition to efforts to impeach the testimony of Officer Carr, counsel for De Christoforo called only character witnesses and the defendant's grandmother. Although he stated in his opening address to the jury that he intended to prove that the defendant was in the car only because he was being given a ride home from "The Attic," a bar in which he worked, he introduced no evidence to support this theory. He repeated in his closing argument that there were many reasons consistent with innocence to explain the defendant's presence in the car, including his being given a ride home. Similarly, no evidence substantiated the suggestion in the opening that "certain pressures" other than consciousness of guilt explained the defendant's flight and concealment.

We treat with several issues raised by the defendant.

1. The defendant contends it was error to deny his motion to inspect the minutes of the testimony of Officer Carr before the grand jury. Two motions to inspect the grand jury minutes, one with respect to each indictment, were filed before trial and were denied at that time without prejudice to their renewal. During cross-examination of Officer Carr, the defendant renewed his motions with respect to Carr's grand jury testimony and moved in the alternative that the judge make an in camera inspection of the minutes. The judge denied all the motions.

In a number of recent decisions we have held that a judge is not required to grant such motions unless the defendant establishes a "particularized need" to see the grand jury minutes involved. *Commonwealth v. Ladetto*, 349 Mass. 237, 244-245. *Commonwealth v. Doherty*, 353 Mass. 197, 209-210. *Commonwealth v. Carita*, 356 Mass. 132, 141-142. *Dennis v. United States*, 384 U.S. 855, 870.

The judge properly applied the rule laid down in these decisions in denying the defendant's motions. Although the defendant contended that in two respects the testimony given by Carr at the trial was inconsistent with prior statements made by him, in neither instance was the alleged prior inconsistent statement claimed to have been made as part of testimony before the grand jury. In one instance the defendant pointed out an inconsistency between Carr's testimony at the trial and his testimony at an earlier probable cause hearing in which Oreto was the defendant.<sup>1</sup> He made full use of this inconsistency in an attempt to impeach Carr's testimony at the trial. In the other instance the defendant claimed an inconsistency between Carr's police report, made shortly after the incident, and his testimony at the trial. As to the events involved in the testimony, Carr's testimony on this point was supported by the unchallenged testimony of Officer Brady who was with Carr when the events occurred. We conclude that there was no inconsistency between Carr's testimony and his report which he clarified at the trial. The defendant did not show that the grand jury minutes would cast further light as to either of the alleged inconsistencies. (compare *Commonwealth v. Gordon*, 356 Mass. 598, 602-603) or that the grand jury testimony might be in any other way inconsistent with Carr's testimony at trial. *Commonwealth v. Otero*, 356 Mass. 724. In these circumstances there was likewise no need shown for the trial judge to inspect the minutes in camera himself. *Commonwealth v. Cook*, 351 Mass. 231, 233. *Commonwealth v. Doherty*, 353 Mass. 197, 210.

The defendant urges that we review and reconsider our holdings in the recent cases cited above which require a showing of a "particularized need" before being permitted

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<sup>1</sup> At the trial Carr stated that the defendant told him the false story about the dead man in the car, whereas at the probable cause hearing he attributed the story to Oreto.



access to the grand jury testimony of a witness who becomes a witness at the trial of an indictment returned by the grand jury. We recognize the difficult burden which this rule places upon a defendant seeking to impeach such a witness on the basis of inconsistencies between his grand jury testimony and his trial testimony. It may be desirable that we give further consideration to this rule. However, it is not appropriate to do so on the limited record of the case before us.<sup>2</sup> Such a change, if any, might more appropriately be accomplished for prospective application by exercise of the rule making power of this court. In this particular case the defendant is not precluded from seeking relief by way of a motion for a new trial at the hearing on which he may, by proper action, compel the production of Officer Carr's grand jury testimony for determination by the trial judge whether such testimony was in any way inconsistent with his testimony at the trial. *Earl v. Commonwealth*, 356 Mass. 181.

2. The defendant moved for a mistrial at the conclusion of the prosecutor's closing argument because of certain remarks in that argument. He claims also that the judge's

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<sup>2</sup> The defendant as the appealing party has the burden of presenting to this court a record on appeal which shows that he was prejudiced by an error committed by the trial court. *Commonwealth v. Klangos*, 326 Mass. 690, 691. The record before us contains no portion of the grand jury minutes or any other information concerning the testimony given by Carr before the grand jury. The minutes are not incorporated in the record in any way. There is nothing to indicate that the defendant availed himself of any of the several methods open to him of having the minutes produced in court for marking, identification and incorporation in the record in connection with his exceptions to the denial of his motions with respect to the minutes. We cannot speculate on what the minutes contain or on whether they contain anything which might have been helpful to the defendant. The defendant has not sustained the burden of furnishing us with a record showing that he was prejudiced by the judge's action on his motions to inspect the grand jury minutes and his alternative motion that the judge inspect the minutes in camera.

instructions to the jury did not adequately cure the prejudicial effect of these remarks.

The defendant is quite justified in objecting to certain portions of the prosecutor's closing argument. It was clearly improper for the prosecutor to state, "They [the defendant and his counsel] said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." It was further improper for the prosecutor to state at another point his personal belief of the guilt of the accused. *Am. Bar Assn. Canon of Professional Ethics*, Canon 15. *Commonwealth v. Mercier*, 257 Mass. 353, 376-377. *Commonwealth v. Cooper*, 264 Mass. 368, 374. *Greenberg v. United States*, 280 F. 2d 472, 474-475 (1st Cir.). *Harris v. United States*, 402 F. 2d 656, 658-659 (D. C. Cir.).

The prosecutor's argument as a whole, however, did not require a mistrial. The judge acted properly within his discretion in denying a mistrial and in relying on curative instructions to erase the error. *Commonwealth v. Bellino*, 320 Mass. 635, 644, and cases cited. The judge adequately guarded the defendant's rights in each instance.

Counsel immediately objected to the first statement cited above. Although the transcript at this point is not clear,<sup>3</sup> the judge was later at pains to point out that he recognized at the time that the argument was improper. The record suggests, as the judge said, that his statement to this effect was not heard over defence counsel's expostulation. In addition, the judge explicitly stated later that he would have given immediate instruction to the jury to disregard the comment if defence counsel had asked for one. No such motion was made. In the absence of a suitable request the defendant cannot now successfully argue that an immediate

<sup>3</sup> The transcript shows that the judge was recorded as saying "No" in what we interpret as agreement with defence counsel's statement, "That is not fair argument."

instruction to the jury was necessary to erase the prejudicial effect of the remark. We suggest, however, that in many instances it may be more effective for the judge to give immediate instructions.

After the closing arguments the judge declared his willingness to include in addition to his general charge on closing arguments of both counsel a specific reference to whatever remarks the defendant thought were unduly prejudicial. In adequate compliance with a written request for instructions about this first objectionable remark submitted by counsel for the defendant the judge specifically covered the subject in his charge. Although the language he used was less emphatic than that requested by the defendant, who took exception to it, it was sufficient to safeguard the defendant's rights. *Commonwealth v. Devlin*, 335 Mass. 555, 568-569. *Commonwealth v. Gordon*, 356 Mass. 598, 604.

Counsel for the defendant did not object at the time to the prosecutor's statement of his personal belief in the guilt of the accused. He did mention it, however, in his motion for a mistrial, and by implication at least requested a specific instruction on it. Nevertheless, his exceptions to the judge's charge were too vague to make clear to the judge that there was objection to the judge's refusal to allude to that comment in particular in accordance with a written request to this effect.<sup>4</sup> Compare *Commonwealth v. Cabot*, 241 Mass. 131, 151. In view, however, of our obligation in capital cases to examine the whole case (G.L.

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<sup>4</sup> Counsel for the defendant excepted "to the Court's failure to give the requested specific instructions to the jury concerning the statements of the District Attorney in his closing. And, in the alternative, I take an exception to the failure to specifically instruct the jury that the District Attorney's statement, which statement has been discussed with the Court and which is made a part of the record [to the effect that defence counsel hoped the jury would find the defendant guilty of a little less than first degree murder], in the proposed Request for Instructions. [sic] Exception is to the refusal to specifically instruct the jury that those statements made by the District Attorney were improper and should be disregarded by them."

c. 278, § 33E), we have considered the effect of this comment in light of the entire proceedings (cf. *Patriarca v. United States*, 402 F. 2d 314, 322 [1st Cir.]) and particularly in the light of the judge's general admonition that counsel in their closing arguments "very often become overzealous. Closing arguments are not evidence for your consideration." We feel this instruction was adequate. As the judge pointed out, reminding the jury of an improper remark, no matter what the purpose, might tend to emphasize it.

The defence has contended here that the improper argument was aggravated in its effect because of the jury's knowledge that the codefendant had pleaded guilty. This premise is not valid, because the codefendant's guilty plea was in no way inconsistent with the defendant's presentation of his defence to the jury. Although the defendant did not testify, his attorney represented in his opening and closing statements to the jury that the defendant was in the murder automobile but was there innocently and was in no way involved with the killing. The jury, upon learning of the guilty plea, then knew that at least one other occupant of the vehicle had admitted criminal responsibility for the murder. It is not logical to conclude that the jury would accept any implied argument of the prosecutor that, because one of the men whom the defendant blamed for the murder had pleaded guilty, the defendant was any less firm in his assertion that he himself was not guilty of any crime whatsoever.

The improper argument must also be viewed in relation to the weight of the evidence of the defendant's guilt. The case against the defendant was an extremely strong one. It is not probable that the jury drew from the argument the subtle inferences now suggested by the defence. In any event, the remarks of the prosecutor were insignificant and

harmless as viewed in the context of the great weight of evidence of guilt.

3. Assignments of error based on the judge's failure to give requested instructions are without substance. Three requested instructions dealt with the inference of innocence which the jury must draw from evidence which is consistent with both guilt and innocence. Although they accurately stated relevant law the judge was not required to instruct the jury in the terms urged by the defendant. He adequately covered the substance of the requested instructions. *Commonwealth v. Mannos*, 311 Mass. 94, 113. *Commonwealth v. Aronson*, 330 Mass. 453, 458. *Commonwealth v. Monahan*, 349 Mass. 139, 170-171. He instructed the jury fully and accurately on the presumption of innocence and the burden of proof which the Commonwealth must sustain. He specifically cautioned them not to base their decision on suspicion or conjecture and further instructed them on the proper treatment of circumstantial as opposed to direct evidence in assessing guilt.

A final requested instruction was to the effect that "[f]light does not necessarily reflect feeling of guilt." The judge properly instructed that evidence of the defendant's actions on the scene, his flight, and later concealment, could be taken "as an addition of guilt." He cautioned them in addition, however, that "common fairness insists that before you draw an inference of guilt for the crime of killing, you should be satisfied that these acts or words were at least a part of the motive or cause of the consciousness of guilt which caused these acts or words to be spoken." The defendant could not require more. "Having given the jury correct rules for their guidance . . . [the judge] is not required to go further and discuss possible findings of fact upon which a defendant might be acquitted." *Commonwealth v. Greenberg*, 339 Mass. 557, 585. *Commonwealth v. Payne*, 307 Mass. 56, 58. In addition, the possibility

that the defendant's flight was prompted by fear rather than guilt had already been suggested in argument to the jury by defence counsel.

4. Four other alleged errors now argued were not raised in the assignment of errors. It is incumbent upon the defendants in capital cases, as in any other kind of case, to file adequate assignments of error according to the procedures provided in G.L. c. 278, §§ 33A-33G. Section 33E of that chapter does not affect the applicability of the other sections in capital cases but only empowers us to order a new trial " 'if satisfied' that because of error of law or of fact the verdict is a miscarriage of justice, or where because of newly discovered evidence or for some other reason justice requires a new trial." *Commonwealth v. Bellino*, 320 Mass. 635, 646. We deal briefly with three of these contentions. None of them demonstrates any injustice which would require corrective action by us under § 33E.

(a) Four questions were put to a character witness for the defendant on cross-examination. Two questions were excluded. The two questions allowed are not conceded by the Commonwealth to have been improper. Any error, however, was harmless because the questions whether the witness's opinion of the defendant would be detrimentally affected by certain assumed facts about him merely stated the prosecution's theory of the defendant's role in the murder, with which the jury were already familiar. In addition, the witness answered in the negative to both questions.

(b) The judge properly excluded clearly hearsay testimony by the defendant's grandmother about what the defendant said to her when he arrived at her house several hours after the murder.

(c) There is no merit to the contention that the procedure provided in G.L. c. 165, § 2, for having the jury determine in a single verdict both guilt and punishment for first degree murder violates the Fifth and Fourteenth

Amendments to the United States Constitution. The United States Supreme Court has recently resolved this issue in *McGautha v. California*, decided with *Crampton v. Ohio*, 402 U.S. 183, 208-220, in which the court sustained the constitutionality of a similar Ohio statute.

5. The defendant's final argument stems from the denial of his motion for a new trial. The motion, as amended some six and one-half months after it was originally filed, was based on allegedly newly discovered evidence outlined in four affidavits. Three of these were to the effect that the defendant was in the car on the night of the murder because Gagliardi had offered him a ride home from "The Attic." One of the three, by the defendant's father, also contained an account of an incident which would suggest that the derringer found in the back of the car belonged to Lanzi. That affidavit asserted also that defence witnesses who were to be called to testify to the substance of the affidavits were prevented from testifying at trial by a threatening telephone call made to the defendant's father during the trial. The fourth affidavit, by counsel for the defendant on behalf of a Medford police officer, stated the substance of a conversation with the defendant's father before the defendant was apprehended to the effect that the defendant was hiding only because he was frightened of Gagliardi.

If the evidence described in the affidavits had been offered at trial in admissible form and believed by the jury, this information might well have led to a different result. The opening statement for the defendant indicates that the defence did in fact intend to introduce such evidence. The evidence thus was hardly newly discovered, although the affidavits advance a reason why much of it was not offered at trial. The threatening telephone call, however, does not explain why neither the defendant's father, who stated in his affidavit that he pleaded with the others to

testify despite the call, nor the Medford police officer was called to testify. Nor is there any explanation for the delay of over six and one-half months before defence counsel presented this information to the court. Much of the information stated in the affidavits was hearsay and would not have been admissible in that form in any event.

The motion for a new trial on the ground of newly discovered evidence was addressed to the sound discretion of the trial judge. *Commonwealth v. Dascalakis*, 246 Mass. 12, 32-33. *Commonwealth v. Sacco*, 255 Mass. 369, 449. *Commonwealth v. Devereaux*, 257 Mass. 391, 394-395. *Commonwealth v. Chin Kee*, 283 Mass. 248, 257. *Commonwealth v. Wallace*, 304 Mass. 680. *Commonwealth v. Sheppard*, 313 Mass. 590, 611. *Commonwealth v. Coggins*, 324 Mass. 552, 555. *Commonwealth v. Robertson*, Mass. .<sup>a</sup> His disposition of it "is not to be reversed unless a survey of the whole case shows that his decision, unless reversed, will result in manifest injustice." "Even if the nature of the evidence is such as to justify a belief that if it had been introduced at the trial the result of the trial would have been different, the judge is not required to grant the motion." *Sharpe, petitioner*, 322 Mass. 441, 444-445. *Commonwealth v. Robertson, supra*, at .<sup>b</sup> The 1966 amendment (c. 301) of G.L. c. 278, § 29, to allow the granting of a new trial where it appears to the trial judge that "justice may not have been done" has not altered the nature of our review of his action. *Commonwealth v. Stout*, 356 Mass. 237, 242.

The weight and import of the affidavits submitted were likewise for the trial judge's discretion. *Commonwealth v. Heffernan*, 350 Mass. 48, 53. He did not have to accept them as true even though they were undisputed. *Commonwealth v. Sacco*, 255 Mass. 369, 450. *Commonwealth v.*

<sup>a</sup> Mass. Adv. Sh. (1970) 857, 859.

<sup>b</sup> P. 860.



*Millen*, 290 Mass. 406, 410. *Commonwealth v. Doyle*, 323 Mass. 633, 637. *Commonwealth v. Coggins*, 324 Mass. 552, 557. In weighing the new evidence presented he was entitled to make use of his knowledge of what had taken place at the trial (*Commonwealth v. Sacco*, *supra*, at 451; *Commonwealth v. Chin Kee*, 283 Mass. 248, 257), and he was not required to give reasons for his action. *Commonwealth v. Sacco*, *supra*, at 450. Finally, there was no requirement that the judge hear oral testimony in support of the affidavits; he was free to choose the procedure by which he would consider the motion. *Commonwealth v. Millen*, *supra*, at 410. *Commonwealth v. Coggins*, *supra*, at 556-557. *Commonwealth v. Heffernan*, *supra*, at 54. In these circumstances the record does not disclose any abuse of discretion in the judge's denial of the motion, which followed oral argument by both sides and the submission of the four affidavits in support of the motion.

6. Acting under G.L. c. 278, § 33E, as amended through St. 1962, c. 453, we have carefully reviewed the evidence. We have done this particularly with a view to testing the defendant's contention unsupported by evidence and referred to principally in the defendant's unsworn statement to the jury that he was in a motor vehicle in the process of being driven home when he was caught up in a situation of murder in which he personally was not involved. Our review indicates that it was open to the jury to return the verdict which they did, and that justice does not require the entry of a verdict of a lesser degree of guilt than that returned by the jury or that there be a new trial.

*Judgments affirmed.*

TAURO, C. J. (dissenting). After a careful review of the entire record I am unable to agree with the majority opinion that the defendant's constitutional right to a fair trial has

been preserved. I will discuss several of the factors which, in combination, lead me to this decision.<sup>1</sup>

The defendant, over his objection, was tried jointly with a codefendant.<sup>2</sup> The codefendant pleaded guilty (in the absence of the jury) to murder in the second degree at the conclusion of the evidence. The trial then resumed with only the defendant De Christoforo present. The judge stated, "Mr. Foreman, madam and gentlemen of the jury. You will notice that the [co]defendant Gagliardi is not in the dock. He has pleaded 'guilty,' and his case has been disposed of. We will, therefore, go forward with the trial of the case of Commonwealth vs. De Christoforo. The arguments will be held at two o'clock this afternoon."

During the course of the prosecutor's closing arguments to the jury he made certain remarks which are conceded to have been improper.<sup>3</sup> An issue raised by these remarks is whether they were so prejudicial in nature in the circum-

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<sup>1</sup> I disagree also with the majority ruling concerning the defendant's right to inspect the grand jury minutes. I make no further comment on this issue except to express my concurrence with the viewpoint of Spiegel, J., in his dissenting opinion.

<sup>2</sup> There was no abuse of discretion in the denial of the defendant's motion for a separate trial.

<sup>3</sup> THE PROSECUTOR: "I am sure you will have no trouble at all reaching a verdict in this case. I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you will find him guilty of something a little less than first-degree murder." DEFENDANT'S COUNSEL: "I object to that." THE JUDGE: "I don't think—." DEFENDANT'S COUNSEL: "That is not fair argument." THE JUDGE: "No." DEFENDANT'S COUNSEL: "That isn't so." THE PROSECUTOR: "Let's talk about murder in the first degree."

At the hearing on the motion for a mistrial the judge maintained that irrespective of its absence in the official transcription, he had stated, at the time of the improper remarks, in response to the defendant's objection, "No. This is improper argument." However, this statement does not appear in the official transcript of the evidence. See G.L. c. 233, § 80. If the court stenographer did not hear the judge's statement it is reasonable to assume that the jury did not. Moreover, as it will be urged later, if these instructions were in fact given they were far from adequate.

stances of the case as to require a new trial. There are two subdivisions to this issue: 1. Should the judge have immediately instructed the jury at the time the remarks were made? 2. Were the instructions given by the judge to the jury during his general charge sufficient to overcome the prejudicial harm to the defendant? If there exists a reasonable doubt as to the resolution of these questions it must be resolved in favor of the defendant.

In accordance with our statutory authority and responsibilities we must examine improper remarks of the prosecution in the context of the entire case. G.L. c. 278, § 33E.

The jury should have been given explicit instructions that they were to draw no inference as to De Christoforo's innocence or guilt from the elimination of the codefendant from the case. Announcing to the jury merely that the codefendant had pleaded guilty, without more, had the probable effect of leading to surmise and speculation in its deliberation. In such circumstances failing to give explicit instructions diminished significantly the defendant's right to a fair and impartial verdict.

De Christoforo, left as the sole defendant, and without appropriate instruction to the jury, found himself in a precarious position. It was in this setting that the prosecutor made improper remarks in his closing argument to the jury.

As the Supreme Court of the United States has stated, the prosecuting attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper

methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88. See *Smith v. Commonwealth*, 331 Mass. 585, 591; *People v. Talle*, 111 Cal. App. 650, 678-679.

It must be emphasized that the highly prejudicial nature of the prosecutor's statement to the jury can be fully assessed only in context with the fact that the jury already knew that the codefendant had pleaded guilty. The jury had received no clarifying instructions as to this turn of events. In the circumstances, the prosecutor's argument may have left an inference with the jury that both defendants had offered to plead guilty to a lesser charge than first degree murder, and that the district attorney had accepted the codefendant's offer but rejected De Christoforo's offer. Even if the defendant had offered to plead to a lesser offence, this fact would have been inadmissible. Indeed, its admission would constitute fatal error. See *Kercheval v. United States*, 274 U.S. 220; *State v. Abel*, 320 Mo. 445. In the present case, however, there is nothing to suggest that the defendant or his attorney had at any time negotiated for a guilty plea or conceded the defendant's guilt.

Furthermore, shortly after making the first improper statement, the prosecuting attorney compounded the original impropriety by stating his personal belief as to the guilt of the accused.<sup>4</sup> It is, of course, a well established rule that an attorney may not properly state his personal belief in argument to the jury. *Commonwealth v. Cooper*, 264 Mass. 368, 374. *Commonwealth v. Sherman*, 294 Mass. 379, 391. See *Betts v. Randle*, 236 Mass. 441, 444; *Doherty v. Levine*, 278 Mass. 418, 419. As the Court of Appeals for the First Circuit has stated, "To permit counsel to express his per-

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<sup>4</sup> "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way."

sonal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing." *Greenberg v. United States*, 280 F. 2d 472, 475 (1st Cir.). See *Harris v. United States*, 402 F. 2d 656, 657-659 (D.C. Cir.); *Hall v. United States*, 419 F. 2d 582, 586 (5th Cir.). The statement by the prosecutor of his personal belief in the defendant's guilt compounded the serious harm resulting from the prosecutor's earlier improper statement, for the statements taken together might lead to an inference that the prosecutor had personal knowledge of the defendant's guilt by reason of the defendant's unsuccessful attempt to plead to a lesser crime. The cumulative effect of the remarks of the prosecutor with no adequate and corrective instructions, coupled with the jury's knowledge without clarifying instructions that the codefendant had pleaded guilty at the close of the evidence, seriously prejudiced the defendant's right to a fair trial.

Moreover, the judge in his final instructions failed to correct the harmful effect of the improper argument. It is the rule of this Commonwealth that the jurors are generally expected to follow instructions to disregard matters withdrawn from their consideration. *Commonwealth v. Bellino*, 320 Mass. 635, 645. *Commonwealth v. Crehan*, 345 Mass. 609, 613. However, there have been persuasive opinions that correcting instructions cannot overcome serious prejudicial effect. What was stated by Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, constitutes a practical and realistic appraisal of the situation. "The naive assumption that prejudicial effects can be overcome by instructions to the jury... all

practicing lawyers know to be unmitigated fiction." There are circumstances in which the prejudicial effect is of such proportions that it cannot be corrected by instructions to the jury.<sup>5</sup> In *Bruton v. United States*, 391 U.S. 123, 135, the court stated: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Moreover, corrective instructions must be sufficiently strong to accomplish the purpose of counteracting the adverse effect of the prejudicial remarks or evidence. *Heina v. Broadway Fruit Mkt. Inc.*, 304 Mass. 608, 611. *Commonwealth v. Crehan*, *infra*. See *London v. Bay State St. Ry.*, 231 Mass. 480, 485-486; *Stricker v. Scott*, 283 Mass. 12, 14-15.

In the instant case, the judge did not instruct the jury at the time the improper argument was made nor did he call for an immediate retraction. See *Commonwealth v. Cabot*, 241 Mass. 131. In his final instructions to the jury the trial judge made the routine observation that arguments of counsel are not evidence: "Consider the case as though no such statement was made." In the circumstances of this case the instructions were far from sufficient to overcome the serious damage done. "It was the duty of the judge to emphasize the fact that the argument had been grossly improper; to point out in plain, unmistakable language the particulars in which it was unwarranted and to instruct the jury to cast aside in their deliberations the improper considerations that had been presented to them, using such

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<sup>5</sup> Error was found in *Commonwealth v. Cabot*, 241 Mass. 131 (that defendant's defence was a technical one), and in *Commonwealth v. Domanski*, 332 Mass. 66, 69-70 (that an unfavorable inference should be drawn from the defendant's failure to call witnesses where there was no evidence that the defendant had witnesses he could call). *Worcester Telegram & Gazette, Inc. v. Commonwealth*, 354 Mass. 578. *Commonwealth v. Gordon*, 356 Mass. 598, 603-604.

clear and cogent language as would correct the obviously harmful effect of the argument. This was not done." *Commonwealth v. Cabot*, 241 Mass. 131, 150-151. *London v. Bay State St. Ry.*, 231 Mass. 480, 486.

The majority opinion notes that if defence counsel had requested immediate instructions at the time of the improper remarks the judge would have given them and that "[i]n the absence of a suitable request the defendant cannot now successfully argue that an immediate instruction to the jury was necessary to erase the prejudicial effect of the remark." In a capital case where a man's life may be at stake, and in view of the requirements of G.L. c. 278, § 33E (as amended through St. 1962, c. 453), this view of the majority is untenable. The trial judge has the ultimate responsibility (as we have on review) of guaranteeing the defendant a fair trial. In the circumstances of this case it was the judge's obligation immediately, with clear and unmistakable language, to instruct the jury that the prosecutor's arguments were grossly improper. Moreover, he should have ordered their retraction by the prosecutor. Even though defence counsel may not have moved for immediate corrective instructions, his objections to the remarks were sufficient to require immediate action by the judge. The prosecutor's comments were so prejudicial in nature that the judge should have acted *sua sponte*. In the total circumstances of the case nothing less could have safeguarded the defendant's constitutional rights to a fair trial.

The remarks of the prosecution in this case were far more prejudicial than the newspaper publicity of the defendant's criminal record in the *Crehan* case.<sup>6</sup> The prose-

<sup>6</sup> In *Commonwealth v. Crehan*, 345 Mass. 609, during the trial certain newspaper articles implied that each defendant had a criminal record. "On this assumption some action by the judge was required to overcome the possibility of prejudice. The judge recognized this and, rejecting the argument for a mistrial, decided that immediate instructions were not required and that a general caution in the charge

cutor's argument in the instant case permitted or perhaps even suggested an inference that the defendant had conceded his guilt and was merely hoping for something a little less than a verdict of murder in the first degree. This diminished his chance for a fair trial to a far greater degree than would have the publication in a newspaper of his criminal background. Unlike a newspaper, the prosecutor ostensibly speaks with the authority of his office. The prosecutor's "personal status and his role as a spokesman for the government tend[ed] to give what he . . . [said] the ring of authenticity . . . tend[ing] to impart an implicit stamp of believability." *Hall v. United States*, 419 F. 2d 582, 583-584 (5th Cir.). The prosecutor's remarks probably called for a mistrial. In any event the judge's failure to instruct the jury adequately and with sufficient force to eliminate the serious prejudice to the defendant constitutes fatal error. Moreover, the judge's routine final instructions to the jury were far from sufficient to correct the error. By then the defendant's position had so deteriorated that his chances for a fair deliberation of his fate by the jury were virtually eliminated.

For these reasons I believe that the defendant did not receive a fair trial. I would grant a new trial.

SPIEGEL, J. (dissenting). I am in complete accord with the Chief Justice's dissenting opinion. Nevertheless I feel impelled to also state my disagreement with the majority's adherence to the rule requiring the defendant to show a "particularized need" to inspect the grand jury minutes of the testimony of witnesses who testified before the grand jury and who subsequently testified at the trial.

1. The current rule imposes on the defendant a well-nigh intolerable burden, and is thus out of touch with the

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would be adequate." This court further stated, "Postponing any instruction until the charge, however, risked an adverse effect in the interval." Judgments were reversed.



"growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis v. United States*, 384 U.S. 855, 870. In the case at bar for instance, the majority hold that the defendant was not entitled to disclosure because he "did not show that the grand jury minutes would cast further light as to either of the alleged inconsistencies . . . or that the grand jury testimony might be in any other way inconsistent with Carr's testimony at trial." How could the defendant make such a showing, in the absence of an admission by the witness (see, e.g. *Commonwealth v. Carita*, 356 Mass. 132, 141-142), without first inspecting the minutes? It is a formidable task confronting a defendant to show a "particularized need," unless perchance he is possessed of supernatural powers. In the case of *Jencks v. United States*, 353 U.S. 657, 667-668, involving a defendant's request for inspection of written reports of F.B.I. agents concerning events as to which they testified at trial, the court pointed out: "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict . . . the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."

This court in *Commonwealth v. Cook*, 351 Mass. 231, 233, citing *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, and *Dennis v. United States*, 384 U.S. 855, has said that our rule requiring a defendant to show a "particularized need" appears to be the same as the Federal rule. We should recognize, however, that many Federal Courts of Appeals have interpreted the *Dennis* case as implicitly

repudiating the "particularized need" standard.<sup>1</sup> One court in the case of *Cargill v. United States*, 381 F. 2d 849, 851-852 (10th Cir. 1967) has said relative to the opinion in the *Dennis* case: "The Court retains the requirement that 'particularized need' be shown in order that the secrecy may be lifted, but hold *in effect* that such need is shown when the defense states that it wishes to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility. Thus the Court as far as cross-examination is concerned has removed most, if not all, of the substance from the particularized need requirement, although it has retained the term. Under this opinion, it appears that the defense is entitled to the grand jury transcript of the witness's testimony when the jury's functions are ended, and when the request is made during the course of trial that it is necessary for the purpose of cross-examining such witness for the above mentioned purposes. The Supreme Court mentions and relies to some extent on the rationale of *Jencks v. United States*, 353 U.S. 657 . . . on this point. The Court also states 'that . . . it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling consideration.' "

Three Courts of Appeals have held that once a government witness has testified at trial, the defendant has a right to examine his grand jury testimony on the subjects about which he testified at the trial, unless the government can show special circumstances exist justifying a protective order. *United States v. Youngblood*, 379 F. 2d 365, 370

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<sup>1</sup> Since the Supreme Court in the *Dennis* case based its decision upon its supervisory powers over the Federal District Courts and not upon a constitutional right of the accused, we are not compelled to follow it. *Connor v. Picard*, 308 F.Supp. 843, 846 (D. Mass. 1970). This case and other Federal cases noted in this dissent are cited not because they are controlling but because I believe that they represent a rule of reason.

(2d Cir. 1967). *United States v. Amabile*, 395 F. 2d 47, 53 (7th Cir. 1968). *Harris v. United States*, 433 F. 2d 1127, 1128-1129 (D.C. Cir. 1970). The First Circuit Court, in *Schlinsky v. United States*, 379 F. 2d 735, 740 (1st Cir. 1967), has said that, in the light of the *Dennis* opinion, "the requirement of 'particularized need' is very easily met. Here, as in [the] *Dennis* [case], it was for cross-examination." But cf. *Walsh v. United States*, 371 F. 2d 436 (1st Cir. 1967).

The American Bar Association (Standards Relating to Discovery and Procedure Before Trial, § 2.1 [a] [iii], p. 13 [Approved Draft 1970]) has recommended that the prosecutor be required to disclose those portions of the grand jury minutes containing relevant testimony of persons whom he intends to call as witnesses at the trial. Several State statutes grant defendants similar rights of inspection in advance of trial. E.g. Deering's Cal. Penal Code Ann., § 938.1; Iowa Code Ann., § 772.4; Ky. Rev. Stat., Rules of Criminal Procedure, Rule 5.16 (2); Minn. Stat. Ann., § 628.04; Okla. Stat. Ann., Tit. 22, § 340.

It is true that in certain instances it may be advisable to maintain grand jury secrecy in advance of trial to protect the safety of witnesses. (See, e.g. *Posey v. United States*, 416 F. 2d 545 [5th Cir. 1969], the case involving the murder of three civil rights workers near Philadelphia, Mississippi, in June, 1964.) But as courts and commentators have often pointed out, once a witness has testified at trial, the reasons for preserving grand jury secrecy simply fade away. *Commonwealth v. Mead*, 12 Gray 167, 170. *State v. Faux*, 9 Utah, 2d 350, 353. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405-406 (dissenting opinion). Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668, 674 (1962). Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 476-477 (1965). As Dean Wigmore (Wigmore, Evidence [McNaughton rev.

1961] § 2362, at p. 736) has said concerning the grand jury witness: "If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce." On the other hand, "if the grand jury testimony is inconsistent with the testimony given at trial, then fair play seems to dictate that the defendant be allowed use of the grand jury minutes for impeachment purposes, unless there is a compelling need for secrecy to protect individuals or in the aid of national security." *United States v. Barson*, 434 F. 2d 127, 129-130 (5th Cir. 1970).

Our decisions holding to the "particularized need" standard are of comparatively recent origin. I do not, however, find this a persuasive reason to follow a rule which does not stand the light of logical analysis. The principal of stare decisis is not absolute because no court is infallible. There should be no reluctance to overrule a decision which is wrong, either because it was not sound when originally promulgated or because subsequent events prove it to be wrong.<sup>2</sup>

Footnote 2 of the majority opinion indicates that if the defendant had included the grand jury minutes in the record on appeal, this court could have then determined whether the defendant had been prejudiced by the judge's action in denying the defendant the right to inspect them, or in refusing to read them himself "in camera." I do not believe that a trial judge or an appellate court should con-

<sup>2</sup> It may be argued that the impact of an abrupt reversal is lessened by an assertion that a court from a date in the future will no longer follow the rule originally enunciated. See, e.g. *Colby v. Carney Hosp.*, 356 Mass. 527; *United States v. Youngblood*, 379 F. 2d 365, 370 (1967); *United States v. Amabile*, 395 F. 2d 47, 53 (7th Cir. 1968). Although I appreciate the validity of such a prospective holding in a civil case, I see no merit whatever in such a theory when a defendant's life or liberty is at stake.

clude that a defendant would not have been able to undermine a witness's credibility by use of the grand jury minutes. This should be the sole privilege of the defendant. "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made *only* by an advocate" (emphasis supplied). *Dennis v. United States*, 384 U.S. 855, 875. This is vastly different from the situation where a question has been excluded in direct examination and an offer of proof is before this court. In such an instance, of course, this court could determine that the evidence contained in the offer of proof would not have benefited the defendant. In cross-examination using the grand jury minutes, we have no means of knowing just what questions counsel for the defendant might ask, or what the answers might be, or what benefit the defendant might derive therefrom.

I am of the firm opinion that we should hold that the Commonwealth, after a witness has testified at trial or at any preliminary or voir dire hearing, be required to turn over to the defendant the relevant portion of his grand jury testimony, unless the Commonwealth can demonstrate a compelling need to keep such testimony secret. *Disclosure* facilitates the fact finding process; *secrecy* only inhibits it.

2. Officer Carr testified that the defendant told a false story about the dead man in the car. The Commonwealth introduced this evidence to show consciousness of guilt. Cross-examination of the officer showed that he had previously testified at a probable cause hearing that it was Oreto who told this falsehood. Even if I were inclined to follow the rationale employed by the majority, I would feel obliged to hold that the requisite "particularized need" was established and consequently would be unable to conclude that the judgment in this case should be affirmed. See *Commonwealth v. Carita*, 356 Mass. 132, 141-142; *Common-*

*wealth v. Doherty*, 353 Mass. 197, 215-216 (dissenting opinion). Compare *Commonwealth v. Kiernan*, 348 Mass. 29, 36.

The Commonwealth should have no interest in convicting an accused on the basis of testimony which has not been as thoroughly impeached as the evidence permits. I see no basis for the apparent assumption by the majority, without having seen the grand jury minutes, that De Christoforo could not benefit from an examination of them because he had "made full use of . . . [an] inconsistency [at an earlier probable cause hearing] . . . to impeach Carr's testimony at the trial." In this area of disclosure of grand jury testimony, the Supreme Court of the United States has said: "There is no justification for relying upon 'assumption.'" *Dennis v. United States*, 384 U.S. 855, 874.

In a similar situation, a Federal Court has held that "[i]nconsistent testimony on a crucial issue by the principle prosecution witness demonstrated 'a particularized need' as required by *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 . . . to produce the pertinent grand jury minutes." *Harrell v. United States*, 317 F. 2d 580, 581, fn. 5 (D.C. Cir. 1963). There the arresting officer had given several different versions of his seizure of narcotics from the defendant's taxicab. The judge refused to allow the defendant to examine the officer's grand jury testimony, or to do the same himself in camera, apparently on the theory that any possible material inconsistencies would be merely cumulative. The court quite rightly pointed out that "[n]ot having seen the grand jury testimony, the trial judge was in no position even to speculate on what effect its disclosure might have had on Hutcherson's credibility, with him or with the jury. We cannot assume that Hutcherson was so discredited by the disclosed inconsistencies that further discrediting was impossible." *Id.* at 581.

3. I make no pretence of determining the defendant's innocence or guilt. However, I am convinced that he did

not receive a fair trial and thus I would reverse the judgment and set aside the verdict.

*Manuel Katz* for the defendant.

*John F. Mee*, Assistant District Attorney, for the Commonwealth.

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**BRIEF FOR THE  
RESPONDENTS IN  
OPPOSITION**





**In the  
Supreme Court of the United States**

OCTOBER TERM, 1972

—  
No. 72-1570  
—

ROBERT H. DONNELLY,  
PETITIONER,

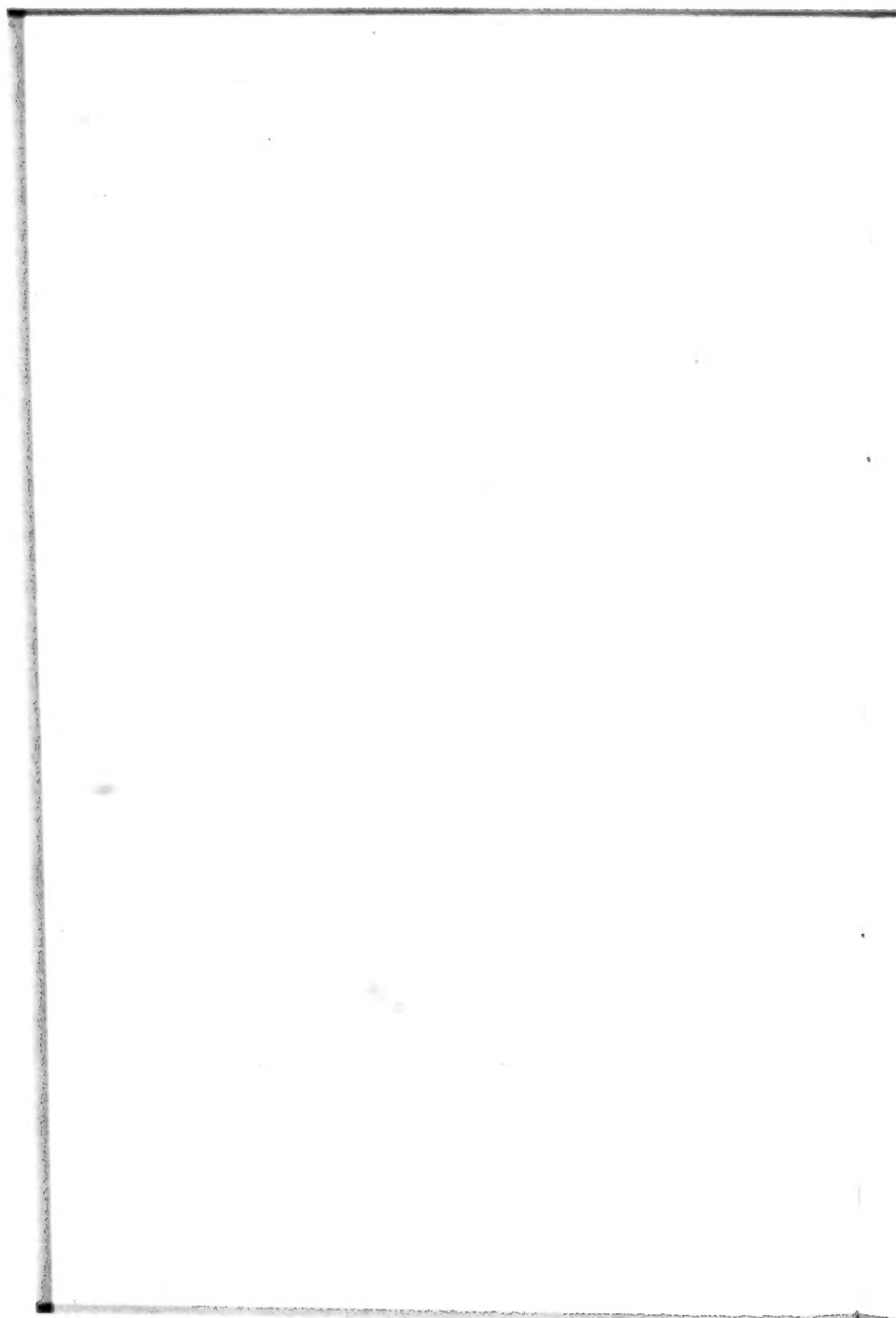
v.

BENJAMIN A. DeCHRISTOFORO,  
RESPONDENT.

—  
ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

—  
BRIEF FOR THE RESPONDENT  
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—

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 72-1570

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ROBERT H. DONNELLY,  
PETITIONER,

*v.*

BENJAMIN A. DeCHRISTOFORO,  
RESPONDENT.

---

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**BRIEF FOR THE RESPONDENT  
IN OPPOSITION**

---

After a jury trial in the Middlesex Superior Court, respondent was convicted of first-degree murder with a recommendation that the death penalty be not imposed. He was sentenced to life imprisonment. On appeal to the Massachusetts Supreme Judicial Court his conviction was affirmed by a divided Court (Pet. 39-65). Thereafter, re-

spondent sought a writ of habeas corpus in the United States District Court for the District of Massachusetts. From the order denying the petition for writ of habeas corpus (Pet. 37-38), respondent appealed. The Court of Appeals reversed (Pet. 28-36).

None of the issues or arguments raised by petitioner is of general significance and each was thoroughly canvassed and properly decided by the court below.

For the reasons set forth in the opinion of the Court of Appeals (Pet. 28-36) and for the reasons set forth in the dissenting opinion of Chief Justice Tauro of the Massachusetts Supreme Judicial Court (Pet. 51-58), it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL T. SMITH

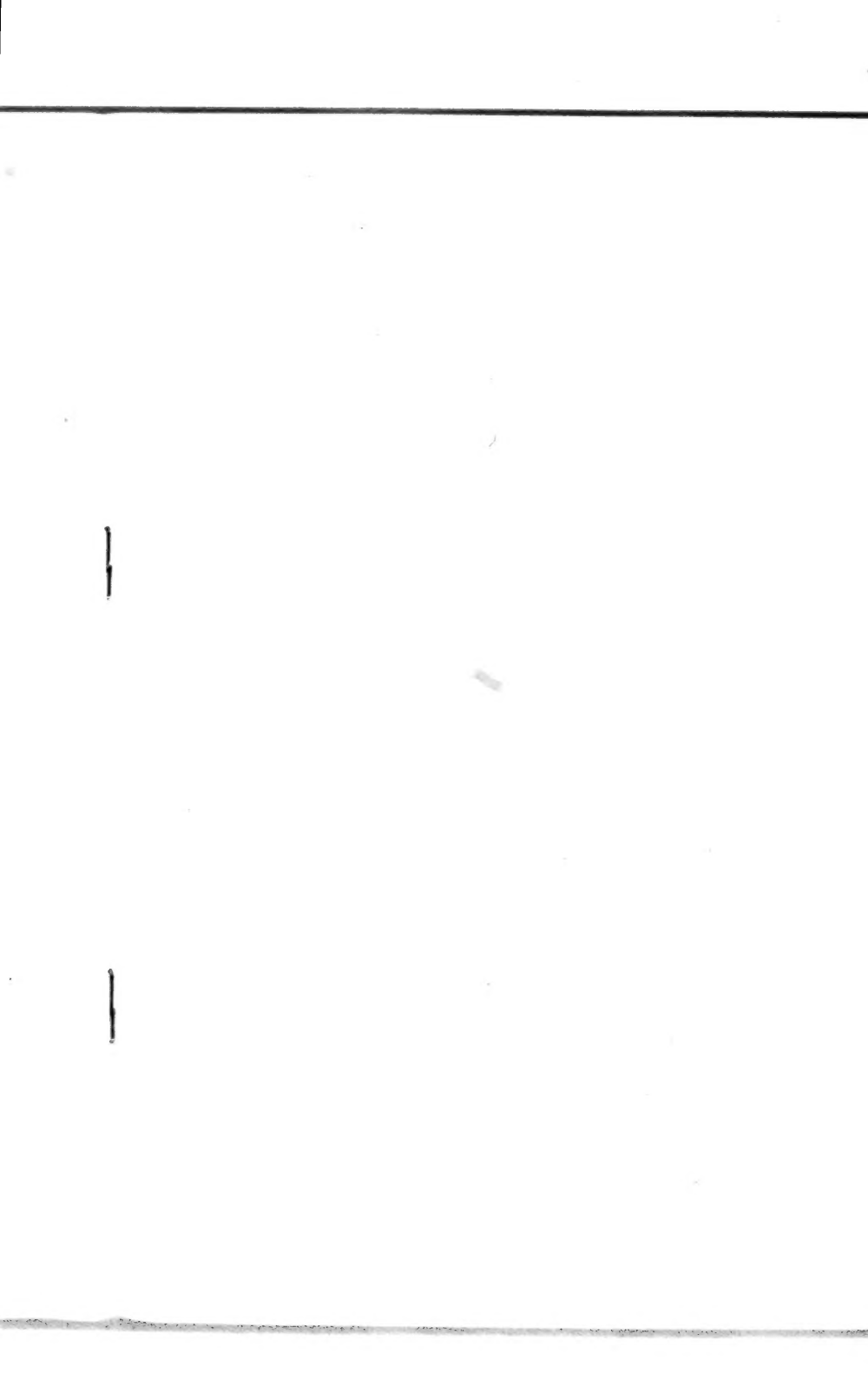
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72 - 1570

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ROBERT H. DONNELLY,  
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ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

BRIEF FOR THE PETITIONER

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 1570

---

**ROBERT H. DONNELLY,**  
PETITIONER,

*v.*

**BENJAMIN A. DeCHRISTOFORO,**  
RESPONDENT.

---

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**BRIEF FOR THE PETITIONER**

---

**Opinions Below**

The opinion of the Court of Appeals is reported at 473 F.2d 1236 (A. 236). The order of the district court (A. 231) is not reported. The opinion of the Massachusetts Supreme Judicial Court (A. 149) is reported at 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 100 (1971).

## **Jurisdiction**

The judgment of the court below was entered on February 22, 1973. The petition for a writ of certiorari was filed on May 23, 1973 and was granted on October 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## **Question Presented**

Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the Fourteenth Amendment to the Constitution?

## **Constitutional Provision**

### **AMENDMENT XIV.**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **Statement of the Case**

### ***A. Proceedings in the State Courts***

On May 8, 1967, a Middlesex County grand jury returned two indictments against Respondent Benjamin A. DeChristoforo. Indictment number 77689 charged DeChristoforo with having committed murder in the first degree of one

Joseph Lanzi. Indictment number 77690 charged DeChristoforo with illegal possession of a firearm. At respondent's arraignment on November 20, 1968, a plea of not guilty was entered in his behalf at the direction of the court. The trial of respondent commenced on April 22, 1969, and lasted seven days.

The first Commonwealth witness, Patriek Carr, a Medford, Massachusetts police officer, testified that at approximately 4:00 a.m. on April 18, 1967, while accompanying Officer John P. Brady in a police cruiser, he observed an automobile with four occupants and approached it to investigate (A. 13-16); that the operator of the vehicle, one Gagliardi, stepped out as he (the witness) approached (A. 16); that a man, later identified as the deceased Lanzi, appeared to be asleep in the front passenger seat of the car with his head slumped back and to the left (A. 17); that Frank Oreto and the respondent were in the back seat of the car and that they each conversed with him (the witness) when they got out of the car (A. 18-19); that the respondent identified himself with a surname other than "DeChristoforo" (A. 19); that the respondent identified the man remaining in the vehicle (Lanzi) as "Johnny Simeone from Boston" (A. 20); that the respondent indicated that the man "sleeping" in the front seat had been "involved in a fight in a joint in Revere" and that they (the occupants of the car) were going to take the other occupant (the deceased Lanzi) to a hospital (A. 20).

Officer Carr testified further that DeChristoforo walked away from the car while Officer Brady shined a light into the car and reportedly observed a small derringer-type gun on the floor behind the driver's seat and a revolver on the seat where Frank Oreto had been seated previously (A. 20);<sup>1</sup> that he (the witness) leaned into the car to examine the

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<sup>1</sup> The guns were subsequently introduced as exhibits in the case (Tr. 381-83). "Tr." refers to State Trial Transcript.



supposedly injured man and determined that he was bloody and not breathing; that Officer Brady likewise examined the man and determined that he was dead (A. 20-21). Frank Oreto was arrested at the scene (A. 21). (On October 26, 1967, Oreto, the only suspect then in custody, pleaded guilty to second degree murder and illegal possession of a firearm. See 1971 Mass. Adv. Sh. 1708 (A. 150). )

On cross-examination Officer Carr testified that DeChristoforo had been seated behind the driver in the automobile and that Oreto had been seated behind the dead man (A. 26).

George Katsas, a pathologist, then testified that he had examined the victim's body and had extracted bullets therefrom at approximately 5:30 a.m. on April 18, 1967 (A. 33-35); that four bullets had been found in the victim's body (A. 36); that in his (the witness') opinion the victim, Lanzi, had died as a result of multiple gunshot wounds in the chest and head which perforated the brain, liver and lungs (A. 38); that smoke rings indicated that a gun was held close to, or in contact with, the clothing and body at the time of the shots (A. 39); that death had occurred between three and five o'clock in the morning, probably nearer to four a.m. (A. 40) and that, in his opinion, the victim had been shot to death in the automobile (A. 40).

On cross-examination, the witness testified further that it was his opinion that the body had not been moved after the shooting (A. 43).

Officer John P. Brady testified that he was the police officer who was with Officer Carr during the night in question; that he (the witness) saw an automobile go through a red light (A. 48); that the car contained four men and that the headlights on the car were off (A. 48-50); that he observed Gagliardi get out of the driver's door; that he heard Officer Carr converse with Gagliardi (A. 50)

and that he walked to the rear of the car and heard a conversation between Officer Carr, Frank Oreto and the respondent, DeChristoforo (A. 54-57).

William Modugno testified that he lived at 9 Fourth Street in Medford (previously established as in the area where the two police officers questioned the respondent) and that, on July 25, 1967, he found a revolver buried in the backyard of his home (A. 62-63).<sup>2</sup>

Walter Dello Russo testified that he was a bartender at the Attic Lounge in Boston; that DeChristoforo was his employer (A. 65-66); that Oreto was the manager of the cocktail lounge downstairs but worked in both places (A. 66-67); that he (the witness) knew the deceased Lanzi; and, that both DeChristoforo and Oreto were in the Attic Lounge at two o'clock on the morning of April 18, 1967 (A. 68).

Susan Morrison, a secretary at Harvard University, testified that she saw DeChristoforo and Gagliardi at the Attic Lounge early in the morning on April 18, 1967 (A. 70-72).

William F. Cummings, a Massachusetts State Police ballisticsian, testified that he had received two weapons from the Medford Police on April 18, 1967, and had examined the same (A. 74); that he had examined bullets removed from the body of Joseph Lanzi and had performed tests thereon (Tr. 684-85); that, in his opinion, the bullet removed from Lanzi's head had been fired by the revolver that had been found on the back seat of the car (A. 77); and that, in his opinion, the three bullets taken from Lanzi's chest cavity had been fired from the gun previously identified as having been found buried in the backyard of William Modugno (A. 77, 78-80).

Edmund Flanagan, a special agent for the Federal Bureau of Investigation, testified that pursuant to the issu-

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<sup>2</sup> The weapon was introduced as an exhibit (Tr. 597).

ance of an unlawful flight warrant he had been involved in the nationwide search for DeChristoforo following the respondent's disappearance on April 18, 1967, and that DeChristoforo had been arrested finally on November 20, 1968, after an extensive investigation by the Federal Bureau of Investigation (Tr. 724-27).

Dennis M. Condon, also a special agent of the Federal Bureau of Investigation, testified as to his experiences attempting to apprehend Gagliardi, co-defendant of the respondent (Tr. 735-41). The trial judge gave a limiting instruction as to the effect of this testimony (Tr. 736) at the request of respondent's attorney (Tr. 275-77, 722).

Counsel for respondent thereupon proceeded to make an opening statement to the jury. During that address, counsel stated that evidence *would be offered* to show that the respondent had been in the car because it was a rainy night and he needed a ride home (Tr. 760); that evidence *would be offered* to establish that respondent's flight from the authorities could be explained on some ground other than "consciousness of guilt" (Tr. 760-61); that evidence *would be offered* to show that DeChristoforo "was only a passenger in an automobile where an incident took place over which he had no control and had no interest in, other than the death of his close friend" (Tr. 761).

The defense case-in-chief contained *no* evidence supportive of any of the above-cited contentions made by defense counsel in his opening statement.

Nevertheless, defense counsel reiterated in closing argument *his unsupported contentions* that the respondent was in the car simply for the purpose of getting a ride home (A. 113) and that the respondent's flight was consistent with something other than consciousness of guilt.

At the close of all of the evidence, while the jury was not present, the respondent's co-defendant, Gagliardi,

pleaded guilty to murder in the second degree (A. 98). After the jury returned, the court stated:

Mr. Foreman, and gentlemen of the jury, you have noted that the defendant Gagliardi is not in the dock. He has pleaded 'guilty' and his case has been disposed of. We will, therefore, go forward with the trial of the case of the Commonwealth v. DeChristoforo... (A. 99).

The trial judge was not requested, at that time, to instruct the jury that Gagliardi's plea should have no effect on its determination of the guilt or innocence of DeChristoforo; no instruction was requested then or given. The fact that the judge advised the jury of Gagliardi's guilty plea and the further fact that respondent's counsel did not request a jury instruction were consistent with respondent counsel's prior attempts to introduce into evidence an exhibit showing that Oreto had already pleaded guilty to the murder of Lanzi and had been sentenced to life imprisonment (Tr. 808, 810-813, 819-822, 825-826). On the question of the admissibility of the Oreto exhibit, respondent's counsel argued to the judge "Well, if the Commonwealth will say [that Oreto pleaded guilty to murder] for the record so that the jury will know it, I will have no quarrel...." (Tr. 820). "If I have an opportunity to prove that [DeChristoforo] didn't personally shoot [Lanzi], at least I can eliminate that from the thinking of the jury." (Tr. 820).

Among other things, respondent's counsel made the following statement in his closing argument:

There may have been any number of reasons why that man [DeChristoforo] ran away from that place. There was a vicious killing of his friend, and who is to say

that he wouldn't be next. And I submit to you, Mr. Foreman and members of the jury, he didn't go out and hide with hoodlums, he didn't go out and hide with racketeers, he went to his grandmother's house, and he stayed in his grandmother's house and he stayed there—and I submit you have a right to draw inferences that he stayed there out of fear, not out of fear of prosecution, but out of fear for other causes (A. 117).

... It is my function to attempt to call your attention to such matters that have developed during the course of the trial as *I feel will warrant, justify or require you* to return a verdict of not guilty (A. 99).

... What has been offered to get you to start thinking along the lines that Butch [i.e., respondent] and others decided they ought to kill this fellow, this friend of theirs? Nothing, of course. *There has been no evidence offered of any disputes here, of any fights, of any ill feeling, of any ill will* (A. 111)

... So that *I think* it's fair to say that the Commonwealth hasn't demonstrated any evidence that would warrant you to even consider the question as to *whether or not DeChristoforo actually pulled the trigger*.

In short, *I think that you would almost be compelled* to come to the conclusion as reasonable people, that he wasn't the killer (A. 110).

... When I say that it's serious, *I think it's serious* only because *I think* that it creates doubts in your mind rather than creates affirmative evidence against him (A. 110).

... [I]f there is a doubt in your mind about that, and *I believe there is, I represent and argue to you there is, I ask you to find him not guilty* (A. 118) (Emphasis added).

The prosecutor's closing argument followed. He began:

Let me preface my argument by saying that first of all I am aware that what I say really is an argument because the word "argument" presupposes that I am prejudiced to the cause that I represent, which of course I am. I think that the very nature of this system, being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it.

I want you to be aware also that I understand completely that my argument is in no way evidence, all it is, is an attempt, I suppose, to point out to you those things that I think are important in the case with reference to our responsibility and the burden of proof.

And I realize that my closing argument should be in no way considered by you as any evidence in the case, and I am sure that you won't consider it as that; as I am sure that my opening statement to you is in no way evidence in the case and won't be considered by you as evidence.

I think the important thing for me to say to you right now with reference to the opening I made to you, with reference to what we were going to prove: I hope that if there was anything in that opening that I said to you that we did not prove, that you will disregard what I said about it and only make your

decision on the evidence that we presented to you. I represent to you that whatever I said in the opening I honestly and honorably intended to prove at the time, and I suggest to you that for the most part we have done that without any fear of contradiction.

Let me say by way of getting into my argument that I am aware of what our burdens are in the courtroom, what the Commonwealth's burdens are, what our responsibilities are, and I am aware of the fact that because DeChristoforo has been indicted for the murder and arrested is no evidence of his guilt and I don't ask you to regard it as such. As a matter of fact, you can't. And I realize that our burden is to prove to you beyond any reasonable doubt his guilt." (A. 119-120).

The prosecutor then told the jury that the facts indicated that Gagliardi (the driver) shot Lanzi three times in the side and that Oreto shot Lanzi in the back of the head (A. 123). The prosecutor argued that DeChristoforo was guilty of murder because he was in the car as a confederate of Gagliardi and Oreto—prepared to assist them in any eventuality (A. 131).

During his lengthy closing argument, the prosecutor made the following remarks which have come under attack:

We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances . . . the defense seems to make some big issue of motive in this case in an attempt, I suppose, to have the jury feel, regardless of what instructions might be given by the court, that an absence of motive in a killing is something that is a detriment to the Commonwealth's case and, therefore, you should sort of equate that to reasonable doubt and then acquit him . . . (A. 120-121).

No objection to the remark was made. Later, the prosecutor argued:

I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder... (A. 129).

An objection to the remark was sustained; the court indicated its agreement that the statement had been improper (A. 129. See also A. 139) 1971 Mass. Adv. Sh. at 1712 (A. 155). No specific curative instruction was requested immediately; no specific curative instruction was given at that time. [The trial judge later stated that had counsel so requested, he would have given such an instruction (A. 139-140)]. Later, arguing to the jury, the prosecutor said:

I expect that you will return a verdict that is a reflection of the truth. I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way (A. 130).

No immediate objection was taken by respondent's counsel to this statement; nor was a specific curative instruction requested at that time. Rather, *on the following morning*, after respondent's counsel had reviewed his copy of the daily transcript, said counsel moved for a mistrial on the ground that the last two remarks quoted above had prejudiced his client. The motion was denied, to which denial respondent's counsel excepted (A. 134). The judge went on to invite respondent's counsel to submit in writing whatever instructions counsel desired the judge to give to the



jury in order to counter the alleged prejudicial effect of the prosecutor's remarks (A. 134-136).

Counsel for the respondent then wrote out and filed a specific request for instructions which is included in the Appendix (A. 145).

Immediately prior to the giving of the charge, respondent DeChristoforo exercised his right to make an unsworn statement to the jury (A. 140-142).<sup>3</sup> He stated that he had asked Gagliardi for a ride home; that on the way home an argument broke out of which he had no part; he saw Joseph Lanzi get shot; he couldn't stop it; he was afraid for his life (A. 141).

The trial judge proceeded to instruct the jury, at length. The remarks set out below were included in the court's final charge to the jury:

... Let me begin this charge by saying to you that, as I have said with regard to unsworn statements, not subject to cross-examination, of the defendant, it is not evidence, nor are arguments of counsel, nor the opening of counsel—whether it be the Assistant District Attorney in this case or whether it be Mr. Smith. It is not evidence for your consideration.

... The closing arguments, too, Madam and gentlemen of the jury, the counsel very often becomes over-zealous. Closing arguments are not evidence for your consideration. Closing arguments, Madam and gentlemen, are merely statements by the respective counsel as to how they hope you will view the evidence which you have heard.

<sup>3</sup> Allowing a defendant in a capital case to make an unsworn statement to the jury had been a custom of long standing in Massachusetts. *Ferguson v. Georgia*, 365 U.S. 570, 586, fn. 17 (1961). A recent opinion of the Supreme Judicial Court, *Commonwealth v. O'Brien*, 1971 Mass. Adv. Sh. 1181, 271 N.E.2d 633 (1971), has apparently put an end to this anomolous practice.

Now, in his closing argument, the District Attorney, I noted, made a statement: "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." There is no evidence of that whatsoever, of course; of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement was made (A. 143-144).

On April 30, 1969, respondent was found guilty of murder in the first degree. It was recommended that the death penalty not be imposed. He was also found guilty of unlawful possession of a firearm (Tr. 1023-24, 1037). A life sentence was imposed as a result of the murder conviction. A sentence of not less than four years, nor more than five years, was imposed for the lesser conviction, to be served concurrently (Tr. 1037).

The respondent appealed to the Massachusetts Supreme Judicial Court, pursuant to Mass. Gen. Laws c. 278, §§ 33A-G. Additionally, respondent moved for a new trial in the Superior Court, claiming the denial of his constitutional rights as set forth herein. The motion was denied and, upon the respondent's exceptions, that denial became part of his appeal.

The Supreme Judicial Court solidly affirmed the judgment of the Superior Court by a majority vote. *Commonwealth v. DeChristoforo*, 1971 Mass. Adv. Sh. 1707, 277 N.E. 2d 100 (A. 149).

#### ***B. Proceedings in the Federal Courts***

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of

Massachusetts on July 7, 1972. Counsel agreed that no facts were in dispute and introduced into evidence the identical record that had been before the Massachusetts Supreme Judicial Court. By order dated September 27, 1972, the District Court judge denied the petition ruling that "the prosecutor's arguments were not so prejudicial as to deprive [DeChristoforo] of his constitutional rights to a fair trial." (A. 231).

On February 22, 1973, by a two to one decision, the United States Court of Appeals for the First Circuit reversed the order of the District Court. (A. 236).

### Summary of Argument

I. In this federal habeas corpus proceeding under 28 U.S.C. §2254, the First Circuit erred in determining that the state prosecutor's remarks in summation to the jury violated the Fourteenth Amendment, because, at the very outset, the circuit court, against the tradition and history of the writ, considered a matter of *state* criminal trial procedure in a federal habeas corpus proceeding. This, the petitioner suggests, has violated the principles of *Townsend v. Sain*, 372 U.S. 293 (1963), and raised an important matter, but nonetheless a state matter, to the level of a federally cognizable claim. The First Circuit has assimilated its task in this matter as that of a court of appellate review over the highest appellate court of the Commonwealth of Massachusetts.

II. In the event that this Court determines that remarks of a *state* prosecutor can reach constitutional proportions in a federal habeas corpus proceeding under 28 U.S.C. §2254, the remarks made by the state prosecutor in the trial of the instant respondent in the Massachusetts court do not constitute a violation of due process:

- (1) The remarks must be viewed in the context of the whole trial proceeding. This is a principle which seems to be established as to *federal* review of *federal* criminal proceedings in the federal courts. *Berger v. United States*, 295 U.S. 78 (1935); *United States v. White*, 14 Cr.L. Rep. 2091 (2d Cir. 1973); *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968). And, petitioner suggests that no greater standard should be applied by a federal court in reviewing a state proceeding.
- (2) When the admittedly improper remarks made by the state prosecutor are examined in the context of the entire state trial proceeding, by comparison to the available federal cases, the remarks fall far short of the level of prejudice deemed by this Court and lower federal courts to constitute a violation of due process.
- (3) To the extent that the First Circuit in its opinion relied upon *Miller v. Pate*, 386 U.S. 1 (1967) and *Hamric v. Bailey*, 386 F.2d 390 (4th Cir. 1967) as authority for determining the prosecutor's remarks in this case to have been violative of due process, the reliance was substantially misplaced, as both *Miller* and *Hamric* dealt with a *deliberate* and *knowing* misrepresentation of material evidence by the prosecutor and are, in petitioner's opinion, clearly and substantially distinguishable from the instant case.

III. The First Circuit determined that on the basis of one remark by the prosecutor in his closing argument, the jury *could* have drawn an inference that the respondent-defendant had offered to plead guilty but that his offer

had been refused. This determination is not only patently unsupported by the actual trial proceeding and the respondent-defendant's obvious trial strategy, but clearly violative of this Court's caution that a showing of essential unfairness must be sustained "not as a matter of speculation but as a demonstrable reality." *Buchalter v. New York*, 319 U.S. 427, 431 (1943), quoting *Adams v. U. S. ex rel. McCann*, 317 U.S. 269 (1942). In short, the circuit court erroneously elevated a mere possibility of inference to a demonstrable essential unfairness.

IV. The First Circuit violated principles of comity and federalism which underlie the federal habeas corpus statute by imposing its own conception of policy and fairness upon the Commonwealth of Massachusetts as to an alleged error which does not violate any discernible and established principle of federally cognizable constitutional right. In so doing, the circuit court apparently ignored the opinion of this Court in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), and the perimeters of a constitutionally unfair trial as set forth in *United States v. Augenblick*, 393 U.S. 348.

### Argument

#### I. THE FIRST CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT THE STATEMENTS MADE BY THE PROSECUTOR IN HIS CLOSING ARGUMENT CONSTITUTED A VIOLATION OF THE FOURTEENTH AMENDMENT.

##### A. *Traditionally, Improper Remarks By A Prosecutor Have Not Been A Proper Subject For Review In A Habeas Corpus Proceeding Under 28 U.S.C. §2254*

The lower federal courts have consistently held that unfair conduct of a state prosecutor falls short of consti-

tuting a lack of due process and is, therefore, not a proper subject for federal review in habeas corpus proceedings under 28 U.S.C. §2254. *Bergenthal v. Cady*, 466 F.2d 635 (7th Cir. 1972); *Higgins v. Wainwright*, 424 F.2d 177 (5th Cir. 1970), *cert. denied*, 400 U.S. 905 (1970); *Downie v. Burke*, 408 F.2d 343 (7th Cir.), *cert. denied*, 395 U.S. 940 (1969); *Castillo v. Fay*, 350 F.2d 400 (2nd Cir. 1965), *cert. denied*, 382 U.S. 1019 (1966); *Chavez v. Dickson*, 280 F.2d 727 (9th Cir. 1960), *cert. denied*, 364 U.S. 934 (1961).<sup>4</sup>

These courts have based their decisions on the principle that it is not the function of the federal court on habeas corpus to oversee the administration of state court procedure, but only to interfere in the state courts' administration of justice when a fundamental federal right has been violated. *Jackson v. People of California*, 336 F.2d 521 (9th Cir. 1964).

The writ of habeas corpus traditionally has been used to safeguard fundamental federally protected rights.

The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review.

The function on habeas is different. It is to test by way of an original civil proceeding, independent

<sup>4</sup> The one exception that appears as a result of petitioner's inquiry is *Pike v. Dickson*, 323 F.2d 856 (9th Cir. 1963), *cert. denied*, 377 U.S. 908 (1964). In *Pike* the court did consider the question of whether or not the remarks of a prosecutor were sufficiently prejudicial so as to have deprived the petitioner of a fair trial. However, in *Pike* the prosecutor had stated: that the defendant's counsel would knowingly permit a defendant to commit perjury; that it was the public defender's duty to permit the defendant to tell a lie; and, that the defendant's story was "made out of wholecloth." The court did not, however, answer the question of whether or not prejudice (federally cognizable) had resulted, but held that the error lay in the failure of the court below to adequately inquire into the facts as alleged in the prisoner-drawn petition.

of the normal channels of review of criminal judgments, the gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution... *Townsend v. Sain*, 372 U.S. 293, 311-312 (1963).

While the petitioner acknowledges that the writ has been expanded to review exceptional constitutional claims of denial of due process, (e.g., *Waley v. Johnson*, 316 U.S. 101 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Moore v. Dempsey*, 261 U.S. 86 (1923) ) the petitioner submits that the admitted impropriety in this case involves merely a matter of state criminal trial procedure, and the lower federal courts have properly refused to consider such matters in collateral habeas corpus proceedings. The petitioner suggests that the First Circuit abandoned this tradition without substantial justification.

B. *In The Event That This Court Determines That Remarks Of A State Prosecutor Can Reach Constitutional Proportions In A Habeas Corpus Procedure Under 28 U.S.C. §2254, The Remarks Of The State Prosecutor In The Instant Case Do Not Constitute Violation Of Due Process When Compared With Existing Federal Standards.*

Absent direct authority on this point, the petitioner suggests that *federal courts*, in reviewing federal prosecutions in the *federal court*, have provided some guidelines in at least two Circuits with respect to review of prosecutorial impropriety against a Due Process backdrop. In each case, your petitioner submits, the courts have established as a primary guide the principle that the entire proceeding be



reviewed as a whole, rather than examination of an alleged impropriety in a vacuum. *United States v. White*, 14 CrL 2091 (2d Cir. 1973); *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968).

Viewed in this backdrop, the record in the instant case reveals that the evidence against the respondent-defendant was substantial: he was discovered in an automobile with the victim in the early morning hours; a gun was found on the floor of the automobile in front of the seat on which the respondent-defendant had been sitting; he gave a false name to the investigating officer and gave a false identification of the victim and gave a false explanation of the circumstances of the victim's condition to the police (A. 16-20); he fled and remained concealed from the police for over a year (Tr. 724-727); medical testimony indicated that the victim had been shot in the automobile in which the victim and the defendant were discovered and that death occurred very shortly before the investigating officers stopped the automobile (A. 40, 43).

Further review of the proceedings as a whole indicates that the improper remarks occurred during a lengthy summation by the prosecutor following a provocative argument by defense counsel. Curative instructions were given by the trial judge in his charge to the jury (A. 143-144). In this context, the petitioner submits that the remarks of the prosecutor cannot be deemed to be so substantially and conspicuously prejudicial as to constitute a violation of the defendant's right to a fair trial.

In *United States v. White*, *supra*, the prosecutor stated that the defendant was "lying" and that the defense was "fabricated." In *Downie v. Burke*, *supra*, the prosecutor referred to the defendant as a "big ape" and a "gorilla." In *Castillo v. Fay*, *supra*, the prosecutor argued that, by their verdict, the jury would judge whether the principal



government witness, a police officer, was an "honest, faithful, courageous public servant" or a "liar." In each of these cases substantial prejudice requiring relief was not found.

By comparison, the remarks in the instant case were at most improper statements of the prosecutor's personal belief, and in the case of the second disputed remark, an ambiguous statement at best. The remarks do not, the petitioner submits, reach a level of prejudice which this Court has held to be violative of Due Process. Petitioner's research discloses two decisions by the Court which have reviewed the constitutional propriety of a federal prosecutor's remarks and conduct in a *federal* criminal proceeding: *Berger v. United States*, 295 U.S. 78 (1935) and *Viereck v. United States*, 318 U.S. 236, 247 (1943). In *Berger* this Court found that the record clearly showed that the prosecutor:

...was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. 295 U.S. at 84.

To this continuing course of improper prosecutorial conduct, coupled with an "undignified and intemperate" argument to the jury, in the face of a weak case, this Court stated:

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached. . . . Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. 295 U.S. at 89.

Nor do the remarks in the instant case reach the level of prejudice considered in *Viereck v. United States*, 318 U.S. 236, 247-248, (prosecutor's totally irrelevant appeal to passion and patriotism). The petitioner submits that the remarks in the instant case fall far short of the level of prejudice deemed by this Court to be violative of Due Process.

The First Circuit, in the instant case, stated, at least implicitly, that for a state prosecutor to convey, or even to permit, a false impression, invades the area of due process; citing *Miller v. Pate*, 386 U.S. 1 (1967) and *Hamric v. Bailey*, 386 F.2d 390 (4th Cir. 1967). The petitioner suggests that such reliance is misplaced, however, as both *Miller* and *Hamric* dealt with a deliberate and knowing misrepresentation of material evidence by the prosecutor and are, in petitioner's opinion, clearly and substantially distinguishable from the instant case.

In *Miller*, the prosecutor offered and the trial court allowed to be introduced into evidence the pants of an accused murderer and rapist. He introduced testimony that the pants were stained with the blood of the victim's blood type, well-knowing that the pants were, in fact, stained

with paint. Similarly, in *Hamric*, the prosecutor deliberately withheld evidence that was material to the defendant's claim of self-defense. Your petitioner suggests that the reliance by the Court of Appeals on these cases is misplaced in at least two respects.

First, there is absolutely nothing in the instant record to support the inference that the prosecutor deliberately or willfully misrepresented what he knew not to be true. After the hearing before the Court of Appeals, both parties stipulated that no offer to plead guilty had been offered (A. 235). By comparison, in *Hamric* and *Miller* the *record* indicated that there was in fact deliberate misrepresentation; in the instant case, the Court of Appeals has based its imputation of egregious misconduct only upon its surmise as to what the jury *might have inferred* from the prosecutor's remark.

Second, under the standards applied by this Court in *Miller* and the Fourth Circuit in *Hamric*, the remarks of the prosecutor in the instant case do not require reversal. The standards seem to be that in determining whether the false impression created by the prosecutor's misrepresentation reached constitutional standards requiring reversal, the misrepresentation or non-disclosure must be such as to materially affect the fact-finding process or to be material and capable of clearing or tending to clear the accused of guilt. *Miller v. Pate, supra*; *Hamric v. Bailey, supra*. See also, *Giles v. Maryland*, 386 U.S. 66 (1967). The petitioner submits that the ambiguous remarks at issue in this case do not approach the level of materiality considered in the cases relied upon by the Court of Appeals.

At most, the improper remark causes only a possible improper inference with respect to a collateral issue, and does not constitute a violation of the Due Process Clause of the Fourteenth Amendment.

C. *The Court Of Appeals Opinion Is Facially In Error.*

At the conclusion of a trial lasting several days and in the course of an extensive closing argument (A. 119-131) the prosecutor remarked:

I am sure you will have no trouble at all reaching a verdict in this case. I don't know what they want you to do by way of a verdict. They said they hope that you will find him not guilty. I quite frankly think that they hope that you will find him guilty of something a little less than first degree murder. (A. 129).

It was concededly improper for the prosecutor to remark as to his personal belief. However, the statement on its face appears to be of little significance. The prosecutor first stated that he did not know what verdict the defendant wanted and then stated what he "thought" they might hope for. The petitioner suggests that, at most, it would appear that the prosecutor was arguing that the evidence presented at trial was sufficient to support a conviction for murder in the first degree and that the defendant, quite reasonably, was hoping for something less.

This Court has cautioned that a showing of essential unfairness must be sustained "not as a matter of speculation but as a demonstrable reality." *Buchalter v. New York*, 319 U.S. 427, 431 (1943), quoting *Adams v. U. S. ex rel. McCann*, 317 U.S. 269, 281 (1942). Consistent with this stricture, the Massachusetts Supreme Judicial Court refused to conclude that the jury drew any "subtle inferences" (A. 157) from the statement.

The Court of Appeals, however, elevated the *possibility* of "subtle inferences" being drawn by the jury to the reality of an obvious conclusion requiring "little sophistication." Petitioner suggests that not only would it require

a good deal of sophistication for a jury of laymen to leap from the prosecutor's statement to a consideration of plea bargaining, but that an inference that the defendant had attempted to plead and the prosecution had refused the plea is illogical: The prosecutor acknowledged to the jury that Oreto and Gagliardi had fired the fatal shots (A. 123). The jury knew that co-defendant Gagliardi had pleaded guilty (A. 99). Accordingly, it makes no sense to infer that the prosecutor would accept a plea of guilty from a co-defendant who had shot the victim and refuse to accept a plea from another defendant who did not shoot the victim.

Defendant's trial strategy was to show DeChristoforo to be an "innocent bystander" to a murder. Counsel was careful to mention in his closing that Gagliardi had pleaded guilty to the murder of Lanzi (A. 107); counsel also adroitly attempted to convince the jury that the people pulling the triggers were Gagliardi and Oreto—not De-Christoforo (A. 106-110). The defendant made an unsworn statement alleging his innocent participation and subsequent fear. This statement was consistent with the defense counsel's efforts to show that the defendant's level of participation in the crime differed from that of the persons who actually fired the shots. If the jury were to consider anything in relation to a plea, would not the reasonable inference be that the defendant did not offer a plea because he hoped he would be believed?

*D. The Court Of Appeals Opinion Violates Principles Of Comity And Federalism Underlying The Federal Habeas Corpus Statute.*

By indulging in strained inferences to create *some* possibility of prejudice, the Court of Appeals has transformed an improper remark by the prosecution into a violation of the Due Process Clause of the Constitution, and we suggest

that the court has violated principles of comity and federalism which underlie the federal habeas corpus statute.

It has long been recognized that:

[t]he Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy *and fairness* unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental....

Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to... be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see also *Coggins v. O'Brien*, 188 F.2d 130 (1st Cir. 1951).

The case of *Castillo v. Fay*, *supra*, is illustrative of a situation wherein this distinction was of central importance. In *Fay*, although determining that certain remarks made by the prosecutor in his summation had been improper, the Second Circuit, nevertheless, held that the state error if any, in not granting a new trial fell short of constituting a deprivation of due process of law. 350 F.2d 400. See also *Higgins v. Wainwright*, 424 F.2d 177 (5th Cir.), *cert. denied*, 400 U.S. 905 (1970); *Downie v. Burke*, *supra*; and *Chavez v. Dickson*, *supra*. The rationale underlying decisions such as *Fay* is readily apparent. While it is highly proper for a federal court to vindicate rights under the federal constitution where it appears that such rights have been abridged, the concept of due process may not be used as a vehicle for imposing federally preferred procedural rules upon state tribunals. See *Snyder v. Massachusetts*, *supra*; *Coggins v. O'Brien*, *supra*; *Soulia v. O'Brien*, 94 F. Supp. 764 (D. Mass. 1950), *aff'd*, 188 F.2d 233, *cert. denied*, 341 U.S. 928 (1951).



Before the federal court should seek to impose its procedural standards on the state court a determination must be made as to whether the alleged error violates fundamental fairness.

It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court intervention is warranted. *Chavez v. Dickson*, 280 F.2d at 735.

The question, then, is not merely whether an act has occurred that is unfair, but whether there is a conspicuous and substantial error which results in a *constitutionally* unfair trial.

The Court of Appeals in the instant case has taken an act of the prosecutor that may have interfered with the defendant's right to a fair trial and elevated it to a constitutional level by deeming the improper remark to be a violation of the Due Process Clause of the Constitution. However, this Court has limited the perimeters of a constitutionally unfair trial.

...[A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in *Moore v. Dempsey*, [261 U.S. 86], that the proceeding is more a spectacle (*Rideau v. Louisiana*, 373 U.S. 723, 726) or trial by ordeal (*Brown v. Mississippi*, 297 U.S. 278, 285) than a disciplined contest, *United States v. Augenblick*, 393 U.S. 348, 356.

Traditionally this Court has sought to achieve a judicial balance between federal and state courts by requiring a showing of real prejudice before the federal court may intervene.

The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic form through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (*Otis v. Parker*, 187 U.S. 606, 609, 47 L. ed. 323, 327, 23 S. Ct. 168), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free. *Snyder v. Mass.*, 291 U.S. 97, 124.

The petitioner submits that it is just such a "gossamer" possibility of prejudice that the Court of Appeals has held to require a new trial in this case.

No one contends that the Massachusetts Supreme Judicial Court used an incorrect legal standard in determining that DeChristoforo had received a constitutionally fair trial. That Court applied the proper legal principles to the facts before it.<sup>5</sup> Of course, it is recognized that, in a

<sup>5</sup> The Massachusetts Court properly considered the entire record in making its decision, this consideration included the weight of the evidence against the accused, the context in which the remark was made, the provocation of the defense counsel and the curative instructions by the trial judge to the jury in his final charge.

Massachusetts law does not require reversal where otherwise improper remarks by the prosecuting attorney are made in response to provocative remarks by the defense counsel. Where defense counsel strongly criticized the F.B.I., the prosecutor was permitted to praise



federal habeas corpus proceeding, federal court judges are not bound by conclusions of state courts on questions of federal constitutional law—even where the facts are not in dispute. Nevertheless, the notions of comity and “federalism” that permeate the federal habeas corpus statute

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the organization. *Commonwealth v. Geagan*, 339 Mass. 487, 516 (1959). Where defense counsel directed the attention of the jury to the prosecution’s failure to produce the defendant’s prior criminal record for impeachment purposes, the prosecutor was allowed to argue that the absence of such a record did not mean that the record did not exist. *Commonwealth v. Smith*, 342 Mass. 180, 185-186 (1961). In *Commonwealth v. Perry*, 254 Mass. 520 (1926), the Supreme Judicial Court stated:

The expressions of personal opinion were an answer to the challenge of the argument for the defendant, they were directed to that argument and they were accompanied by declarations that the jury were to consider the evidence without regard to the opinions and feelings of the speaker.

Language ought not to be permitted which is calculated by abusive epithets, vehement statements of personal opinion, or appeals to prejudice, to sweep jurors beyond a fair and calm consideration of the evidence. *Much, however, must be left to the discretion of the judge who has seen and heard the innumerable incidents of a trial where men are contending earnestly.* 254 Mass. at 530-31 (Emphasis added.)

While the First Circuit has found unpersuasive the argument that provocation by defense counsel may justify retaliatory expression of personal belief by the prosecution, *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968), *cert. den.*, 393 U.S. 1022 (1969), the Court of Appeals did suggest that “serious provocation would be weighed as a factor in evaluating possible prejudice.” 404 F.2d at 321. Moreover, *Patriarca* involved procedure in the lower federal court which is subject to the supervision of the Federal Court of Appeals. However, the initial question in the instant case is whether, as a matter of Massachusetts law, the remarks required reversal. If they did not, the question becomes whether or not they deprived the defendant of his constitutional right to a fair trial under some more rigorous standard of Due Process.

The Supreme Judicial Court held that under Massachusetts law the prosecutor’s remarks were improper statements of personal belief. *Commonwealth v. Cooper*, 264 Mass. 368 (1928); *Commonwealth v. Mercier*, 257 Mass. 353 (1926). However, “...it is not every impropriety that occurs in a trial that requires reversal.” *Commonwealth v. Bottiglio*, 357 Mass. 593, 598 (1970). The entire record must be and was considered in order to ascertain whether the

would seem to demand that in the circumstances of this case some deference be given to the opinion of the Supreme Judicial Court. *Cf. United States ex rel. Harris v. State of Illinois*, 457 F.2d 191, 197 (7th Cir. 1972). This is

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impropriety was "unfair, prejudicial and unwarranted" or did it so appeal to passion or so abuse the defendant as to warrant the belief that prejudice resulted. *Commonwealth v. Dascalakis*, 246 Mass. 12, 27-28 (1923). The Supreme Judicial Court, quoting from *People v. Kingston*, 8 N.Y.2d 384, 387 stated the test as follows, "... whether the claimed defect influenced the jury and tainted its verdict. If the record demonstrates that it did not, then the defendant is not entitled to a new trial." *Commonwealth v. Bottiglio*, 357 Mass. 593, 598 (1970).

It is well settled that improper remarks by counsel may be cured by an appropriate instruction to the jury. *Commonwealth v. Balakin*, 356 Mass. 547 (1969); *Commonwealth v. Stout*, 356 Mass. 237 (1969); *Commonwealth v. Mercier*, 257 Mass. 353 (1926). Such curative instructions have, of course, been utilized and, depending upon the circumstances of the case, been deemed to be adequate, not only in Massachusetts courts but in the federal courts as well. See *Baiocchi v. United States*, 333 F.2d 32, 38 (5th Cir. 1964); *Homan v. United States*, 279 F.2d 767 (8th Cir.), *cert. denied*, 364 U.S. 866 (1966); *Painten v. Commonwealth*, 252 F.Supp. 851 (D. Mass. 1966).

The instructions given by the trial judge in the instant case were completely adequate to remove any residual prejudicial effect of the prosecutor's remarks. With respect to the remarks made by the prosecutor during his closing argument, the trial judge emphasized that such arguments were not evidence (A. 142-144). He explicitly directed the jurors to disregard the prosecutor's second disputed remark and to "[c]onsider the case as though no such statement was made" (A. 143-144); this second remark was the only comment which had been objected to immediately by respondent's counsel. On appeal, the Supreme Judicial Court noted that it was quite satisfied with the trial judge's decision to rely on curative instructions to erase any impropriety. The Court held that "[t]he judge adequately guarded the defendant's rights in each instance." 1971 Mass. Adv. Sh. at 1712-1713 (A. 154-155).

Finally, as the Supreme Judicial Court noted, when counsel for the respondent objected immediately after the prosecutor's second disputed remark, the objection was in effect sustained. *Id.* at 1712. (A. 155). Later, the trial judge "explicitly stated that he would have given immediate instruction to the jury to disregard the comment if defense counsel had asked for one." *Id.* However, no such motion was made. Additionally, no objection was made immediately after

certainly the position expressed by Circuit Judge Campbell in his dissent (A. 243).

But the majority of the Court of Appeals were obviously unwilling to grant any substantial consideration to the opinion of the Supreme Judicial Court. The petitioner suggests that the majority of the Court of Appeals strained in constructing a doubt about the fairness of respondent's trial. The petitioner suggests that the Court of Appeals has attempted to extend its general federal court supervisory power over the state court. And, your petitioner suggests that such a procedure would result in transforming the federal court's traditional habeas corpus power into that of a court of appellate review—a result contrary to the history of the writ. *Townsend v. Sain, supra*. And, the petitioner suggests further that the Court of Appeals has ignored the good faith allegiance that state court judges pledge to a vigorous enforcement of the United States Constitution—even in their own courts.

### Conclusion

For the reasons stated above the petitioner respectfully requests this Court to remand the case to the First Circuit Court of Appeals with directions to reverse its order granting the writ and to direct the Court of Appeals to

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the prosecutor's third disputed remark and no curative instruction was requested at that time.

Thus, when viewed in the context of the entire case, the petitioner suggests that the remarks were not calculated to arouse the passion of the jurors nor to prejudice them against the defendant; the remarks were no more prejudicial than those involved in the *Smith, Perry* and *Geagan* cases, *supra*, and the Massachusetts Supreme Judicial Court properly found that they were not so significantly prejudicial as to require reversal.

reinstate the order of the District Court denying the respondent's petition for a Writ of Habeas Corpus.

Respectfully submitted,

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U.S. SUPREME COURT, U.S.  
FILED  
JAN 3 1974  
MICHAEL DOUGLASS, JR. CLERK

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 72-1570

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**ROBERT H. DONNELLY,**  
PETITIONER,

*v.*

**BENJAMIN A. DeCHRISTOFORO,**  
RESPONDENT.

---

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**BRIEF FOR THE RESPONDENT**

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1972

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No. 72-1570

---

ROBERT H. DONNELLY,  
PETITIONER,

v.

BENJAMIN A. DeCHRISTOFORO,  
RESPONDENT.

---

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

---

**BRIEF FOR THE RESPONDENT**

---

**Opinions Below**

The opinion of the Court of Appeals is reported at 473 F.2d 1236 (A. 236).<sup>\*</sup> The order of the district court (A. 231) is not reported. The Memorandum of the United States Magistrate appears at A. 136. The opinion of the Massachusetts Supreme Judicial Court (A. 149) is reported

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<sup>\*</sup> "A" refers to Appendix.

at 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 700 (1971).

### **Jurisdiction**

The judgment of the court below was entered on February 22, 1973. The petition for a writ of certiorari was filed on May 23, 1973 and was granted on October 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

### **Question Presented**

Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the Fourteenth Amendment to the Constitution?

### **Constitutional Provisions**

#### **AMENDMENT VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

#### **AMENDMENT XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **STATEMENT OF THE CASE**

### **Proceedings in the State Courts**

On May 8, 1967, a Middlesex County grand jury returned two indictments against the respondent. Indictment No. 77689 accused the respondent in the language of the statute with having committed murder in the first degree on April 18, 1967, in Medford, Massachusetts, of one Joseph Lanzi.<sup>1</sup> Indictment No. 77690 accused the appellant in two identical counts of unlawfully carrying "under his control in a vehicle a firearm... without authority and permission so to do." (A. 10-12)

Also on May 8, 1967, the same grand jury returned separate identical indictments against one Frank Oreto and one Carmen Gagliardi. (See A. 93, 98, 150.)

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<sup>1</sup> In response to a Bill of Particulars seeking "the manner in and the means by which the defendant did assault and beat the said Joseph F. Lanzi and the manner in and the means by which the defendant did allegedly kill and murder the said Joseph F. Lanzi, the Commonwealth responded, "The Commonwealth alleges that the defendant alone or in joint concert with others fired four bullets into the body of Joseph F. Lanzi," and further stated "the Commonwealth alleges that the defendant in joint concert with others fired four bullets into the body of Joseph F. Lanzi." In accordance with established procedure in the Commonwealth of Massachusetts these Particulars were read to the jury. (A. 3; Tr. 236)\*\*

\*\*Tr. refers to State Trial Transcript.

Prior to the respondent's arraignment, Oreto was brought to trial before Judge Sullivan and on October 26, 1967, pleaded guilty to so much of the indictment as alleged murder in the second degree, and to the gun charges. These changes of pleas were accepted by Judge Sullivan who imposed a life sentence on the murder charge and concurrent sentences of three to five years in State's prison on the gun charges. (A. 93.)

At DeChristoforo's arraignment on November 20, 1968, pleas of not guilty were entered.

Over his objections the respondent was tried jointly with Gagliardi. (A. 2-4, 163.)

Trial commenced on April 22, 1969, and the Commonwealth, conceding that it was Gagliardi and Oreto who fired the actual shots,<sup>2</sup> relied on circumstantial evidence to connect DeChristoforo in a joint venture with them to kill Lanzi. The Commonwealth relied substantially upon the testimony of Officer Carr who testified that the respondent had made certain false and incriminating statements. (A. 150, 187, 188, 191, 194.) There was also evidence of flight by the respondent, which he sought to prove was indicative of fear for his life and not consciousness of guilt. (Tr. 804, 805.)

At the trial there was evidence that on April 18, 1968, the respondent was 31 years of age, married, a resident of Stoneham, Mass., and was employed as the manager of the Attie Lounge, a night club in Boston. (A. 90, 66, Tr. 724.) Prior thereto he had been a page boy for the Senate of the Commonwealth of Massachusetts for seven or eight years. There was uncontradicted testimony that he had enjoyed a reputation for honesty and for being a non-violent person, both in the community where he lived and

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<sup>2</sup> It was not until his closing argument to the jury that the Assistant District Attorney so conceded. See fn. 3.

in the State House where he worked, and for many years had been a close personal friend of the deceased Joseph Lanzi. (A. 86-93.)

At about 5:15 P.M. on the evening of April 17, 1967, the respondent was at work at the Attie Lounge and at about 2:15 A.M. on the morning of April 18, the bartender, one Dello Russo, left the premises. At that time, the respondent, in the performance of his functions as manager, was engaged in his usual practice of closing the club and clearing it of any late customers. Frank Oreto was standing at the bar. Gagliardi was also on the premises. It was raining very hard at the time that Dello Russo left the premises at about 2:15 A.M. or 2:30 A.M. (A. 66-69.)

On April 18, 1967, at about 3:55 A.M. Patrick J. Carr, a City of Medford police officer, was operating a police cruiser on Middlesex Avenue, Medford. In the car with him was Officer John P. Brady. It was raining heavily. (A. 13, 16.)

They saw a red colored Ford, in which there were four young men, approaching from the opposite direction at a speed between 20 and 30 miles per hour. The Ford made a turn slowing down to between 15 and 20 miles an hour. Because of their youth and the early hour, Officer Carr's suspicions were aroused. He turned the police car around and trailed the Ford until it stopped in front of a house at 6 Fifth Street. Officer Carr stopped the cruiser alongside, but a little beyond, the Ford. Both he and Officer Brady alighted from the cruiser and as they did, the operator of the Ford stepped out onto the sidewalk. Both police officers knew him as Carmen Gagliardi. (A. 14-18, 25, 26.) Officer Carr asked Gagliardi what was going on and who owned the car. Gagliardi replied that he was going into his house and that the car was a rented automobile. He backed away from the Officers, keeping both of his hands in his pockets, and headed in the direction of



a house at 9 Fifth Street. At the curbing, he turned and walked up the stairs of that house and opened the front storm-door. At the time, both Officers knew that Gagliardi lived in the area but did not know in which house. They later learned that Gagliardi actually lived in the house at 11 Fifth Street. (A. 17, 19, 24, 25, 51, 52.)

The respondent was seated behind the driver's seat to the extreme left of the back seat. Oreto was seated behind the deceased Joseph Lanzi who appeared to the police officers to be asleep on the right hand side of the front seat. (A. 26, 17.)

On direct examination Officer Carr testified that he asked both of the men in the back seat of the car to get out, which they did. Both men got out of the car from the right rear door, Oreto first and then the respondent. (A. 18.) Oreto was wearing a pair of black kidskin gloves. (A. 56.)

Officer Brady testified that he couldn't recall as to whether he had seen the appellant's hands when the respondent came out of the Ford, but testified that he does not "suggest that he (respondent) might have been wearing gloves." (A. 60.)

Officer Carr testified that he asked both men for identification and each said that he had none. He then asked them to identify themselves. Oreto stated that his name was Joseph Rigo from Boston. The respondent gave a name, which neither officer remembered, but, according to Carr's testimony it was not the name "DeChristoforo." (A. 19.)

Officer Carr testified that he asked who the man in the front seat was and that it was the respondent who replied that the man's name was Johnny Simeone and that he, Simeone, had been involved in a fight in Revere, but he would be all right and that they were going to take him to a hospital. (A. 20.) Before the officers' suspicions were fully aroused, respondent was permitted to leave the scene. (A. 55, 56.)

Officer Carr and his partner then walked to the other side of the car and stepped onto the sidewalk. He flashed his light into the rear of the car and saw a small (fully loaded) derringer on the floor of the car behind the driver's seat. He then moved the light around and saw a Smith and Wesson revolver on the rear seat at the place where Oreto had been sitting. He opened the car door, removed both guns and asked Oreto whether either of those guns belonged to him. Oreto answered in the negative. Officer Carr took the guns, placed them in the cruiser and then returned to the Ford. He opened the driver's door of the car and examined Lanzi. Lanzi was dead, having been shot four times. It was subsequently discovered there were no fingerprints on the derringer. (A. 20, 21, 36, 84.)

Lanzi had died in the car sometime between 3:00 and 4:00 A.M. as the result of a head wound inflicted by the Smith & Wesson revolver and chest wounds inflicted by a Harrington & Richardson revolver afterwards discovered in the vicinity of where the car had been stopped. (A. 38, 39, 62.)<sup>3</sup>

On cross-examination, counsel for appellant showed, by means of a transcript at the probable cause hearing held to determine whether Oreto should be held for Lanzi's murder, that Officer Carr had testified under oath that it was Oreto who had made certain of the false, incriminating statements he attributed to DeChristoforo at trial. (A. 27-30.) In addition, it was shown that in his hand-written police report Officer Carr stated that he first examined the deceased *after* DeChristoforo had left, whereas Officer Carr's testimony was to the effect that his examination

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<sup>3</sup> The Commonwealth during closing argument conceded that DeChristoforo had not fired any shots into the body of Lanzi and further conceded that it was Gagliardi, who shot three bullets into Lanzi's side, and that it was Oreto who shot the bullet into Lanzi's head. (A. 123.)

of the deceased had prompted his questioning of DeChristoforo resulting in the aforementioned false and incriminating statements. (A. 30-32.)

There was further evidence that after DeChristoforo had left the scene, the officers discovered that Lanzi was dead and they then arrested Frank Oreto. (A. 21.)

After the return of the indictments charging him with first degree murder and illegal possession of firearms, an FBI warrant for unlawful flight was lodged against the respondent in April of 1967. He was apprehended by the FBI in November of 1968 at his grandmother's house where he had been living continuously since the incident.<sup>4</sup>

After the close of all of the evidence, respondent's co-defendant, Gagliardi, offered to plead guilty to murder in the second degree, and the plea was accepted, in the absence of the jury. Trial then resumed with DeChristoforo as the only defendant present. When the jury returned, the court stated: "Mr. Foreman, and gentlemen of the jury, you have noted that the defendant Gagliardi is not in the dock. He has pleaded guilty and his case has been disposed of. We will, therefore, go forward with the trial of the case of the Commonwealth v. DeChrostoforo...".

No instructions were given to the jury to the effect that Gagliardi's plea should not be considered in deciding the guilt or innocence of DeChristoforo.<sup>5</sup> (A. 98, 99.)

During the course of the prosecutor's closing argument to the jury he made a substantial number of statements which the Supreme Judicial Court has held to be "clearly improper." *Commonwealth v. DeChristoforo* 1971 Mass.

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<sup>4</sup> At trial the respondent sought to introduce evidence to show that he was living at his grandmother's house out of fear for his life and not to evade prosecution. The proffered evidence was excluded. (Tr. 804, 805.)

<sup>5</sup> No such instruction was requested.

Adv. Sh. 1707, 1711-1712, 277 N.E. 2d 100, 105. (A. 164.)<sup>6</sup>

The prosecutor opened his summation by stating: "Let me preface my argument by saying first of all I am aware what I say really is an argument because the word 'argument' presupposes that I am prejudiced to the case that I represent, which of course I am. I think that the very nature of this system being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it." (A. 119.)

Building upon this concept of his duty as a prosecutor,<sup>7</sup> he stated, by way of pointing out the duty and obligation of the jury: "And we have a sworn responsibility, it seems to me, to sit here in this courtroom now and say to ourselves: '*We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances.*'" (A. 121.) (Emphasis supplied.)

Continuing, the prosecutor represented to the jury: "I think the whole thrust of the government's case was that Gagliardi shot him three times here, and Oreto shot him in the back of the head, and our friend, DeChristoforo,

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<sup>6</sup> Even Circuit Judge Campbell in his dissenting opinion said: "While the remarks made *were improper* and might warrant reversal in the exercise of our supervisory powers, were this case to be before us upon appeal from a federal district court, I am unable to agree, especially when read in the context of the prosecutor's extended arguments, that they were either so meaningful or prejudicial as to amount to error of constitutional proportions." (A. 243.) (Emphasis added)

<sup>7</sup> Contrariwise, *American Bar Association Canons of Professional Ethics* No. 5 (1968) provided that the primary duty of a prosecutor is "not to convict but to see that justice is done." As a corollary to this, it would seem that his adversary posture should be rational discourse and not inflammatory rhetoric. See also *American Bar Association Standards Relating To The Prosecution Function*, 5.8.

had a cocked Rohm derringer ready to administer another shot if that became necessary.” (A. 123.)

In pointing out to the jury that the respondent was asking the jury to find that he was in the automobile for the purposes of being given a ride home to Stoneham, the prosecutor went on to argue, “. . . so at that point we have to conclude that Frank Oreto, I suppose was carrying two guns, or Gagliardi was carrying two guns. *You and I know that’s a myth.*” (A. 124.) (Emphasis supplied.)

He continued: “The inference I want you to draw is: These people are clever enough—is that they don’t have guns that can ever be traced to them. *You know that and I know that.*” (A. 127.) (Emphasis supplied.)

Continuing to express his personal belief in the guilt of the respondent, the prosecutor stated to the jury: “*I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way . . .*”. (A. 130, 131.) (Emphasis supplied.)

Moreover, in the context of the jury just having been informed of Gagliardi’s plea of guilty, the prosecutor continued his expressions of personal belief and knowledge. He stated to the jury: “I don’t know what they want you to do by way of a verdict. They said that they hoped that you find him not guilty. *I quite frankly think that they hope you find him guilty of something a little less than first degree murder.*”<sup>8</sup> (A. 129.) (Emphasis supplied.)

Counsel for the respondent immediately voiced his objection. The following colloquy took place:

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<sup>8</sup> The respondent at no time sought to plead guilty to any offense. In the Court of Appeals the parties stipulated: “It is stipulated that at no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial.” (A. 235.)

"Mr. Smith: I object to that.

"The Court: I don't think—

"Mr. Smith: That's not fair argument.

"The Court: No.

"Mr. Smith: That isn't so."<sup>9</sup> (A. 129.)

At the close of the prosecutor's argument and before the trial court's charge to the jury, counsel for the respondent moved for a mistrial on the grounds that the prosecutor's argument to the jury had been "so prejudicial and so unfair that it cannot be cured by instructions to the jury." (A. 132.) To the denial of the respondent's motion for a mistrial, the respondent duly excepted. (A. 134.)

Thereupon, counsel for the respondent requested the trial court to "forcefully and specifically instruct the jury that the statements made by Mr. Irwin (the prosecutor) in his closing argument to the effect that the defendant was not really seeking a not guilty" was improper argument and that "from the beginning of the trial up to this point, the defendant has maintained his complete innocence and in no way has indicated that he is willing or that he is seeking to have the jury find him guilty of a lesser offense." The court suggested that the request be reduced to writing so that the court could then "file it with the papers." (A. 135.)

Counsel for the respondent then wrote out and filed the following specific request for instructions:

"In his closing argument to you, members of the jury, Mr. Irwin, the assistant district attorney, stated with reference to the defense:

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<sup>9</sup> Later, the Judge said that he did tell the jury at the time "No. This is improper argument." (A. 133.) At any event, if the Court Stenographer didn't hear the Judge's statement, it is reasonable to assume that the jury did not. Moreover, this was not the only time that the Judge in overruling an objection simply said "No." (See Tr. 588.)

'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope you find him guilty of something a little less than first-degree murder.'

"(a) That statement was improper argument. There is no basis for that statement. The defendant has consistently maintained his innocence by virtue of his plea of not guilty as to any and all charges or accusations made against him.

"(b) As far as you are concerned the defendant is still presumed to be innocent of any and all charges before you.

"(c) You are to totally and completely eliminate from your minds any such suggestion or argument made by Mr. Erwin (sic), insofar as that is humanly possible and if you find that you cannot eliminate that from your consideration of the case then you are to inform the foreman of the fact.

"(d) I ask you now whether there is anyone on the jury who feels he cannot eliminate that from his deliberations and from his consideration of his decision in this case.

"(e) I again instruct you that you are to disregard that statements made by Mr. Erwin (sic) and consider this case as though no such statement was made."  
(A. 145, 146.)

Instead of granting the specific request the judge, during his final charge, instructed the jury:

"Now in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that

you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement was made.

"And the same instructions, of course, apply to any statements in argument which were made by Mr. Smith on behalf of the defendant, if any, you feel there be, statements which he made in his argument which were not supported by the evidence which you heard here during the trial of the cause. In short, the opening statement of counsel or the arguments of counsel at the conclusion of the case are not evidence for your consideration."<sup>10</sup> (A. 143, 144.)

On April 30, 1969, the jury returned a verdict of guilty of murder in the first degree with a recommendation that the death penalty not be imposed. Respondent was given a life sentence on that indictment.<sup>11</sup> (A. 6.) The jury also returned a verdict of guilty on the indictment charging him with unlawfully carrying two firearms and he was sentenced thereon to a concurrent 4-5 year term. (Tr. 1037.)

The respondent seasonably filed his claim of appeal to the Massachusetts Supreme Judicial Court raising the

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<sup>10</sup> See fn. 19 *infra*.

<sup>11</sup> Oreto and Gagliardi, whom the Commonwealth conceded were the ones who did the actual shooting, were, upon their pleas of guilty to second degree murder, given life sentences which under Massachusetts law permits consideration of their parole in 15 years as distinguished from respondent's sentence which does not permit him to be considered for parole. Mass. Gen. Laws (Ter. Ed.) c. 127, s. 133A.



issues raised by the petition herein.

In addition the respondent filed a motion for a new trial again claiming that he had been denied his constitutional right to a fair trial on the same grounds as those set forth in the petition herein.<sup>12</sup> To the denial of that motion the respondent duly excepted and that exception became part of the record on appeal to the Supreme Judicial Court. (A. 146, 147.)

The respondent duly prosecuted his appeal from his convictions to the Supreme Judicial Court of Massachusetts in accordance with Mass. G.L. (Ter. Ed.) c. 278, ss. 33A-33G, as amended. The judgment of the Superior Court was affirmed by a majority of the Massachusetts Supreme Judicial Court over the strong dissents of Chief Justice Tauro and Mr. Justice Spiegel. *Commonwealth v. DeChristoforo*, 1971 Mass. Adv. Shts. 1707, 1718-1730, 277 N.E. 2d 100, 109-115. (A. 149-176.)

Because the petitioner has made certain misstatements in his brief at page 6 dealing with statements purportedly

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<sup>12</sup> "The motion, as amended, some 6½ months after it was originally filed, was based on allegedly newly discovered evidence outlined in four affidavits. Three of these were to the effect that the defendant was in the car on the night of the murder because Gagliardi had offered him a ride home from 'The Attic'. One of the three, by the defendant's father, also contained an account of an incident which would suggest that the derringer found in the back of the car belonged to Lanzi. That affidavit asserted also that defence witnesses who were to be called to testify to the substance of the affidavits were prevented from testifying at trial by a threatening telephone call made to the defendant's father during the trial. The fourth affidavit, by counsel for the defendant on behalf of a Medford police officer, stated the substance of a conversation with the defendant's father before the defendant was apprehended to the effect that the defendant was hiding only because he was frightened of Gagliardi.

If the evidence described in the affidavits had been offered at trial in admissible form and believed by the jury, this information might well have led to a different result. The opening statement for the defendant indicates that the defense did in fact intend to introduce such evidence." *Commonwealth v. DeChristoforo*, 71 Mass. Adv. Sh. 1707, 1716-17, 277 N.E. 2d 100, 107-8. (A. 159-160.)

made by counsel for the respondent during his opening to the jury, the respondent's counsel's opening is set forth in its entirety below:

*Opening by Respondent's Counsel*

"Mr. Smith: May it please the Court, Mr. Foreman and Madam Juror and gentlemen of the jury.

As Mr. Irwin has pointed out to you, an opening is not evidence, it is simply a statement of counsel as to what counsel intends or expects will be shown to you introduced into evidence in either the Government's case, when he made his opening or in the defense when I make my opening.

I represent Benjamin DeChristoforo. We intend to introduce evidence to establish that Mr. DeChristoforo, a young married man of good character, was employed at an establishment known as the Attic, as a manager. And that while so employed there his duties were to close up the place and see to it that no person bought liquor after hours.

That he lived out in Stoneham, and that his home was a matter of a five-minute ride or so from the area on Fifth Street in Medford where this automobile had come to a stop. That on the night in question, that it was a very rainy night, that he had no means of transportation, and that he was given a ride to go home. That in that vehicle was the deceased, Joseph Lanzi. There will be evidence of the relationship between Lanzi and DeChristoforo.

That after the incident developed, after the police arrived at the scene, he left the scene for reasons which will be explained or introduced to you; and that it was that the defendant intends to show it was (sic) because of any consciousness of guilt, but for

very valid reasons which we hope that this jury will understand and will consider in an atmosphere other than consciousness of guilt.

We expect to show to you that he then went to his grandmother's house, as a result of certain pressures, and stayed at his grandmother's house until the FBI arrested him.

We intend to introduce evidence to negate any consciousness of guilt on his part; and we intend to introduce evidence of good character, and evidence of the fact that he was not of a violent nature.

And with that, we expect to show to you Mr. Foreman and Madam Juror and gentlemen of the jury, this man was only a passenger in an automobile where an incident took place over which he had no control and had no interest in other than the death of his close friend, and that he did (sic) participate in any way in that killing." (Tr. 759-761.)

Notwithstanding the emphasis by the petitioner on page 6 of his brief alleging that respondent's counsel had stated in his opening "*that evidence would be offered ...*", a reading of the opening establishes that no such bold assertion was made.<sup>13</sup>

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<sup>13</sup> After cautioning the jury that counsel's remarks were not evidence, the strongest language used by respondent's counsel in his opening was "we intend to introduce evidence" and "we expect to show."

In fact, the record discloses that evidence was introduced that the respondent and Lanzi were close friends; that it was raining heavily; that Gagliardi, the operator of the automobile in which DeChristoforo had been a passenger, had been on the premises of the club in Boston as DeChristoforo was engaged in his usual practice of closing the club at or about 2:15 a.m.; that the respondent lived in Stoneham which is near the area where Gagliardi lived in Medford. (A. 14, 16, 17, 26, 66-70, 72, 87-93; Tr. 724.) Furthermore, the respondent did in fact offer to show that his flight to his grandmother's house was as a result of fear for his own life and not consciousness of guilt. That offer of proof was excluded by the trial court. (Tr. 803-806.), and see fn. 12.

Notwithstanding the emphasis in petitioner's brief at page 6, at no time in closing argument did defense counsel assert — let alone reiterate — *"his unsupported contentions that the respondent was in the car simply for the purpose of getting a ride home and that the respondent's flight was consistent with something other than consciousness of guilt."*

Rather, after pointing out the proximity between Medford and Stoneham, defense counsel argued that under the circumstances and based upon the evidence the jury "would have a right to draw the inference that all he was in there (the car) for was to get a ride home, because there is no evidence that he was in there for any other purpose." (A. 113.)

#### **Proceedings in the Federal Courts**

On July 7, 1972, respondent filed his petition for writ of habeas corpus in the United States District Court for the District of Massachusetts (A. 178). On August 28, 1972 the United States Magistrate filed his Memorandum (A. 186) which was "to the effect that the writ should be granted" (A. 197). After a hearing on September 5, 1972, (A. 177, 196), the District Court, on September 27, 1972, entered an Order Denying Petition For Writ of Habeas Corpus, ruling that "with respect to the first contention of the petitioner, the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial." (A. 231).

Upon appeal, the United States Court of Appeals for the First Circuit, on February 22, 1973, reversed the Order of the District Court, Circuit Judge Campbell dissenting. (A. 236). On remand to the District Court, prior to the filing of the petition for writ of certiorari herein, the respondent was admitted to bail by an Order entered on April 12, 1973.

## Summary of the Argument

### I

A. By asserting his personal belief in the guilt of the accused, by leading the jury to believe that there was evidence of the respondent's guilt known to the prosecutor but not introduced into evidence, by falsely stating to the jury that the respondent was seeking to have the jury find him guilty of something a little less than first degree murder which had the effect of falsely indicating to the jury that the respondent had offered to plead, and by appealing to the passions and prejudice of the jury, the prosecutor violated virtually all recognized standards for proper argument. (Pages 19-35).

B. The cumulative effect of the prosecutor's concededly improper and prejudicial remarks, particularly those statements which had the effect of suggesting to the jury that the respondent had offered to plead guilty to "something a little less than first degree murder," rendered the respondent's trial fundamentally unfair in violation of his Fourteenth Amendment right to due process. (Pages 35-37).

### II

By stating to the jury that the respondent was hoping for a finding of guilty of "something a little less than first degree murder," a fact which he knew not to be true, the prosecutor invited the jury to conclude that the respondent had conceded his guilt. By conveying such a false impression, the prosecutor violated the respondent's constitutional right to due process. *Miller v. Pate*, 386 U.S. 1 (1967). (Pages 37-41).

## III

Under the Sixth and Fourteenth Amendments the respondent was entitled to confront and cross examine all persons whose adverse statements, declarations, or testimony reached the jury. *Parker v. Gladden*, 385 U.S. 363 (1966). This right of cross-examination applied not only to testimony from the witness stand but also to statements by the prosecutor which may have had the effect of testimony. *Douglas v. Alabama*, 380 U.S. 415 (1965). By virtue of a number of improper remarks the prosecutor in effect testified against the respondent, in one instance giving deliberately false testimony, without affording the respondent any opportunity to cross examine or rebut such testimony, thereby violating the respondent's Sixth and Fourteenth Amendment rights. (Pages 41-45).

## IV

The constitutional error in this case cannot be considered harmless, because the petitioner has not only failed to demonstrate beyond a reasonable doubt that the error was harmless, but once having conceded that the error may have interfered with respondent's right to a fair trial, the error cannot be declared harmless belond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). (Pages 45-48).

**Argument**

## I.

THE PROSECUTOR IN HIS CLOSING ARGUMENT VIOLATED VIRTUALLY ALL RECOGNIZED STANDARDS FOR PROPER ARGUMENT TO THE JURY, THE CUMULATIVE EFFECT OF WHICH VIOLATED RESPONDENT'S RIGHT TO A FAIR TRIAL.

Like a United States Attorney, a District Attorney "is the representative not of an ordinary party to a contro-

versy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in criminal prosecutions is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *American Bar Association Code of Professional Responsibility, Ethical Consideration 7-13*. See also, the predecessor of this provision, *ABA Canons of Professional Ethics, No. 5*: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

*American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, Part I*, provides:

"1.1

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession, and in this report. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in ABA Standards, The Defense Function, section 1.3.

(e) In this report the term "unprofessional conduct" denotes conduct which it is recommended be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are intended as guides for the conduct of lawyers and as the basis for disciplinary ac-

tion, not as criteria for the judicial evaluation of prosecutorial misconduct to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation of prosecutorial misconduct, depending upon all the circumstances."

Part V, 5.8, provides:

"(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

"The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the



other, of important governmental powers that are pledged to the accomplishment of one objective only, *that of impartial justice*. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence not only in his profession, but in government and the very ideal of justice itself." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958). (Emphasis supplied.)

Throughout his closing argument the prosecutor made a number of statements which the Massachusetts Supreme Judicial Court held to be "clearly improper" *Commonwealth v. DeChristoforo*, 1971 Mass. Adv. Sh. 1707; 1711-1712, 277 N.E.2d 100, 105 (A. 154.)<sup>14</sup>

The prosecutor commenced his final argument to the jury in the following fashion:

"Let me preface my argument by saying first of all I am aware that what I say, really is an argument because the word 'argument' presupposes that I am prejudiced to the case that I represent, which, of course, I am. I think that the very nature of this system being adversary, pitting one side against the other, naturally makes you point to the things which you think support your particular position and to more or less ignore those things which I suppose detract from it." (A. 119.) (Emphasis supplied.)

He then proceeded to identify his duties and obligations as a prosecutor with those of the jury. He argued:

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<sup>14</sup> It should be noted that all twelve of the Judges that have thus far reviewed this case have considered the prosecutor's remarks to be improper and five of the Judges have considered the remarks to be so improper as to violate the respondent's constitutional right to a fair trial.

"And we have a sworn responsibility, it seems to me, to sit here in this courtroom now and say to *ourselves*: We are faced here *in our judgment* with one of the most savage killings that any jury could ever see anywhere under any circumstances."<sup>15</sup> (Emphasis supplied.) (A. 120, 121.)

It goes without saying that the killing of a human being, especially in the fashion that Lanzi was murdered, is a disgraceful, shocking and revolting act. However, for the prosecutor to describe Lanzi's murder as "(in) *our judgment . . . one of the most savage killings that any jury could ever see anywhere under any circumstances*" (A. 120, 121.), respondent believes cannot be ascribed to mere hyperbole or overzealous advocacy. (Emphasis supplied.)

The only purpose of the use of this "unnecessary villification" (A. 190) was to inflame the passions and prejudices of the jury. (However, no objection was made.)

The prosecutor then went on, conceding for the first time, that DeChristoforo had not actually fired any shots by saying to the jury: "*I think* the whole thrust of the government's case was that Gagliardi shot him three times here, and Oreto shot him in the back of the head, and our friend, DeChristoforo, had a cocked Rohm derringer ready to administer another shot if that became necessary." (A. 123.) (Emphasis supplied.)

In the light of the Commonwealth's particulars (See Statement of the Case, f.n.1) that "the defendant alone or in joint concert with others fired four bullets into the body of Joseph F. Lanzi," the defense was required to anticipate that the Commonwealth would introduce evidence

<sup>15</sup> "The prosecutor is neither a witness, a mentor, 'nor a 13th juror' (the ultimate in absurdity, advanced by the prosecutor in *Greenberg v. U. S.*, 1 Cir. 1960, 280 F.2d 472)." *U. S. v. Cotter*, 425 F.2d 450, 452 (1st Cir. 1970).

or argue from the evidence that DeChristoforo had actually fired one or more shots into the body of Joseph Lanzi. The defense, therefore, had no choice but to attempt to prove that it was Gagliardi and Oreto who had fired the four shots. As a consequence, a goodly portion of the three days actually spent in the introduction of evidence during the trial was devoted by the defense in attempting to establish that it was physically impossible according to the evidence, for DeChristoforo, seated where he was, to have fired any of the shots.

Petitioner argues that the failure of the respondent to ask for instructions from the trial judge with respect to the Judge's statement to the jury as to Gagliardi's plea of guilty was "consistent with respondent's counsel's prior attempts to introduce into evidence an exhibit showing that Oreto had already pleaded guilty to the murder of Lanzi and had been sentenced to life imprisonment. (Tr. 808, 810, 812, 819-822, 825-826.)

It was only because the Commonwealth had refused to concede that respondent fired no shots that respondent felt compelled to offer to introduce Oreto's record of conviction. In the light of petitioner's argument and only partial quote at page 7 of Petitioner's Brief, respondent is constrained to elaborate on what did occur.

After the Commonwealth had rested and prior to Gagliardi's plea of guilty, respondent's counsel, at a lobby conference with counsel for all parties present, on the afternoon before the case actually went to the jury, offered to introduce the original record of the court showing that Frank Oreto had been charged with and pleaded guilty to the murder of Joseph Lanzi. Following is the material colloquy that took place, only a portion of which is referred to in Petitioner's Brief at page 7:

"The Court: ... I will hear you Mr. Smith as to why this should be marked as an exhibit. I take it you are offering this to be offered as an exhibit.

"Mr. Smith: Yes, your Honor, it is a public record, it is a record of this court. It is an original record of this court. It establishes that Frank Oreto pleaded 'guilty' — was charged, rather, with the murder of Joseph Lanzi, that he pleaded 'guilty' to the murder of Joseph Lanzi; and I believe I have a right to show that someone else other than the defendant DeChristoforo killed Joseph Lanzi.

"The Court: Of course that would be true if it were different circumstances; but here, at least in the Particulars, the Commonwealth sets out clearly that these two defendants are being charged with the murder, and it has been the posture of this case all the way through that these two defendants are being charged with the murder of Lanzi while either by themselves or while acting in concert with others; and to include Oreto who, truthfully, has been—in fact, I myself sentenced him to life imprisonment—

"Mr. Smith: But, the Particulars say that DeChristoforo personally did it, or in concert with others did it.

"The Court: Yes.

"Mr. Smith: Now, I have a right to show that he personally didn't do it.

"The Court: I think it's the posture of the case now that there has been no evidence from the Commonwealth as to who personally did it; and, quite obviously they are relying upon concerted action. And, that being the case, I don't see how it's material that this man was sentenced to life imprisonment.

"Mr. Smith: I have no objection if the District

Attorney will stand up and stipulate in front of the jury that he does not say that Benjamin DeChristoforo actually pulled the trigger of any gun that resulted in the death of Lanzi.

"The Court: I didn't say that he felt that way, or that the proof tended that way, I merely said, it's quite clear from the evidence, which has gone in now, there is no evidence as to which precise person or persons pulled the trigger—whether one, two or three, or no one. It's obvious, also, that two different caliber weapons—therefore, two different weapons were used.

What do you say about this, Mr. Balliro?<sup>16</sup>

"Mr. Smith: One more thought: I have a right to show my man didn't pull the trigger.

"The Court: I don't think that makes any difference. How does it prejudice your man if he was acting in concert with those who did; he is equally guilty.

"Mr. Smith: Because the law is different now. If I can have it determined that he didn't pull the trigger, then we are down to a different set of problem—a different problem, as to how the law applies to a so-called conspiracy or joint venture.

"The Court: If you are relying on the Stasiun case for that statement, why the Stasiun case is clearly distinguishable.

At any rate, let me hear from you, Mr. Balliro. . . .

"Mr. Irwin: Well, that is an entirely different thing. The fact of the matter was that Mr. Oreto elected to plead guilty in this court, and Your Honor, in your discretion, decided that he could plead to second-degree murder.

Now, there is nothing wrong with that or inconsistent with that. The fact of the matter is that if Mr. Oreto had been tried, he certainly could have been

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<sup>16</sup> Joseph Balliro was the attorney representing Carmen Gagliardi.

tried on the basis of first-degree murder, with the possibility that he could have been convicted of it. Mr. Balliro cannot have it both ways. He talks about the Commonwealth having it both ways.

If that were the situation, if the legal argument was that these men could not be tried on first-degree murder, the time to make that argument was well in advance of this trial.

"The Court: I would have thought so.

"Mr. Smith: I offered it because I think I have a right to put it in, especially where there's been testimony that Oretó—

"The Court: As I understand your proposition, it is that someone else pleaded guilty to murder and that that, therefore, eliminates your client.

"Mr. Smith: It doesn't, ipso facto, eliminate him.

"The Court: Of course, it doesn't because the whole premise that the Commonwealth is advancing is that this murder was done by the three of them acting in concert.

"Mr. Smith: Well, if the Commonwealth will say so for the record so that the jury will know it, I will have no quarrel; but that isn't the Commonwealth's position. The Commonwealth's position is that either DeChristoforo personally shot him or, if they say he didn't, then he was acting in joint concert.

Now, they can't have that both ways.

"Mr. Irwin: *Of course we can.* (Emphasis supplied.)

"Mr. Smith: If I have an opportunity to prove that he didn't personally shoot him, at least I can eliminate that from the thinking of the jury.

And then the question of whether he was involved in a joint action is another question of fact for them to decide. But to throw it in the laps of a jury and

say: "Now it's up to you to decide one way or other, either he killed him himself personally or he was acting with a group"—

"The Court: Why wouldn't the solution to this be to announce to the jury that Oreto had pleaded guilty to murder, period?

"Mr. Smith: I am content with that ...

"The Court: Well, I will think it over. I will take this matter under advisement .... I am not about to say that I am going to do this. For the record, I want to make that clear."<sup>17</sup> (Tr. 810-813, 819-821.)

From this colloquy, it was quite apparent that the Commonwealth was maintaining its position that it expected to argue to the jury that DeChristoforo fired a shot or shots into the body of Lanzi.

There would have been no need for the defense to have spent time of preparation, the time of the court and jury, and a substantial portion of closing argument in an attempt to convince the jury of a fact about which the Commonwealth knew prior to trial and ultimately conceded in closing argument, if the Commonwealth had conceded, as it later did, that it was Gagliardi and Oreto and not DeChristoforo who fired the shots. The defense trial strategy would have been materially altered. The unfairness of the Commonwealth's position is obvious. The respondent cannot understand how petitioner can equate respondent's efforts to offer Oreto's conviction, under the circumstances set forth, with the prosecutor's argument to the jury suggesting that the respondent had offered to plead guilty.

There was no evidence that DeChristoforo owned or had ever had possession of any gun, at any time, let alone a derringer. There was no evidence that DeChristoforo had

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<sup>17</sup> The Judge did not adopt his own solution and did not "announce to the jury that Oreto had pleaded guilty to murder."

ever conspired with anyone to harm, let alone kill, Lanzi. There was evidence that they were "extremely close personal friends." (A. 87.)

Taking the Commonwealth's evidence at its best, the most that could be argued was that since Oreto used one gun and Gagliardi another, that where a third gun, namely the derringer, was found on the floor of the car near where DeChristoforo was seated that a jury might draw the inference that it was DeChristoforo's gun. Assuming *arguendo* the correctness of such an inference, it is a far cry from a nexus that DeChristoforo was ready or willing to use it. But the prosecutor *did not ask the jury* to draw such an inference. *He told them what his opinion was.* That opinion was not based upon any evidence introduced at the trial as to DeChristoforo's readiness to shoot Lanzi if it became necessary.

Had the prosecutor been a witness under oath, he could not have so testified and if *arguendo* such evidence would have been admissible, it would have been subjected to the test of cross-examination. Such an opinion coming from a government official was fortified by the prosecutor's apparent honesty in stating in the very same sentence (for the first time during trial) what he knew all along, that is, that it was Gagliardi and Oreto who had done the shooting.

The argument was not interrupted by an objection.

Immediately following this opinion testimony, the prosecutor raised the level of his personal opinion to that of personal knowledge. He stated to the jury: "... so at that point we have to conclude that Frank Oreto, I suppose, was carrying two guns, or Gagliardi was carrying two guns. *You know and I know that is a myth.*" (A. 124.) (Emphasis supplied.)

He continued: "The inference *I want you to draw is:* these people are clever enough — is that they don't have



guns that can ever be traced to them. *You know that and I know that.*" (A. 127.) (Emphasis supplied.)

During trial the respondent had introduced evidence that in the community where he had lived and at the State House where he had worked he had a reputation for honesty and for being a non-violent person. (A. 89-93.)

No evidence was introduced by the Commonwealth to rebut this.<sup>18</sup>

There was no evidence that the respondent had ever been the confidant or associate of gangsters, hoodlums, or racketeers. There was no evidence that he ever owned or had a gun that either could or could not be traced to him.

Notwithstanding this the prosecutor in effect stated that *he knew* that DeChristoforo had guns that could not be traced to him.

DeChristoforo was the only one before the court. It cannot be said that the prosecutor was referring only to Gagliardi and Oreto inasmuch as the prosecutor in his argument referred to all three guns. He made it very clear that in referring to "these people" who "don't have guns that can ever be traced to them" (A. 127) that *he knew* that DeChristoforo was one of "these people."

It is submitted that the prosecutor *did not know* that either Oreto or Gagliardi did not carry two guns. On the state of the evidence he could not *know* that DeChristoforo was one of "these people" who "don't have guns that can ever be traced to them."

What he really was testifying to was that *he knew* that neither Oreto nor Gagliardi was responsible for the der-

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<sup>18</sup> Under Massachusetts practice, once evidence of good character has been introduced, the Commonwealth has the right to rebut it. See *Commonwealth v. Maddocks*, 207 Mass. 152; *Wigmore on Evidence*, (3rd Ed.) 358.

ringer being in the back of the car and that DeChristoforo was the type of person who is clever enough to carry a gun or guns that can ever be traced to him.

Had any such evidence been proffered by a witness under oath, it would have been excluded. Here, however, the prosecutor represented that *he knew* this to be a fact. In short, he attempted to subvert the fact finding process and in effect testified that he had personal knowledge unknown to the jury.

This argument was not interrupted by any objection.

After testifying to the jury as to his *opinions* and *knowledge* of matters crucial to the case, the prosecutor continued to express his personal belief that the respondent was guilty of first degree murder *beyond any doubt*. (Emphasis supplied.)

He stated to the jury: "*I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way . . .*". (A. 130, 131.) (Emphasis supplied.)

No witness under oath would have been allowed to so testify.

As one who had already told the jury of his and its "*sworn responsibility*", (A. 121.) (emphasis supplied) the jury was faced with the extraneous and irrelevant issue as to whether the prosecutor was, indeed, "honest" and "sincere." And if he was, how could it question his assurance based on his "sworn responsibility" that he *believed* that "*there is no doubt in this case, none whatsoever.*" (A. 130, 131.) (Emphasis supplied.)

It follows that such a knowledge by the prosecutor, if true, would have to be based on evidence or facts known to the prosecutor but not known to the jury.

In addition to the foregoing improper and prejudicial comments by the prosecutor and in the context of the jury just having been informed of Gagliardi's plea of guilty, the prosecutor then made his most egregious statement. He said: "*I don't know what they want you to do by way of a verdict. They said that they hoped that you find him not guilty. I quite frankly think that they hope you find his guilty of something a little less than first degree murder.*" (A. 129.) (Emphasis supplied.)

For the first time, respondent's counsel interrupted the argument and objected. Contrary to petitioner's statement (Brief for Petitioner, p. 11) the trial judge *did not* sustain the objection. The trial judge cut counsel off by saying, "No." (A. 129.)

It is respectfully submitted that counsel thereupon was confronted with a very limited choice of procedure. Having already had the experience of being cut off from pursuing an objection by a direction of "No" from the judge (Tr. 588), the options open to counsel were (a) engage in what might be regarded as a disruptive procedure and pursue the objection; or (b) pursue what has been generally regarded as the better and "more usual" practice to approach the bench at the conclusion of the summation and request an immediate instruction. See *Harris v. United States*, 402 F.2d 655, 657 (D.C. Cir. 1968).

It is important to note that the prosecutor commenced his argument immediately after 3:50 p.m. and concluded it shortly before 4:20 p.m. At most the time taken by the prosecutor in his closing argument was something under thirty minutes. Immediately after the prosecutor ended his argument, Judge Sullivan announced that he would instruct the jury "tomorrow morning" and at 4:20 p.m. ordered the closing of court. (Tr. 914, 915.)

Short of being disruptive, counsel had no choice but to wait until the next morning, at which time, before court reconvened, counsel for the respondent requested a lobby conference where he moved for a mistrial on the grounds that the prosecutor's argument to the jury "was so prejudicial and so unfair that it cannot be cured by instructions to the jury." (A. 132.) To the denial of that motion, respondent duly excepted (A. 134).

Thereupon, counsel for the respondent requested the trial judge to "forcefully and specifically instruct the jury that the statement made by Mr. Irwin (the prosecutor) in his closing argument to the effect that the defendant was not really seeking a not guilty . . . was an improper statement; that from the beginning of trial up to this point the defendant has maintained his complete innocence and in no way has indicated that he is willing or that he is seeking to have the jury find him guilty of a lesser offense." The trial judge stated "I will do so, and I suggest you write it out and I will file it with the papers, what you write out, and I will so instruct the jury." (A. 135.)

Counsel thereupon proceeded to write out and file the specific instructions set forth at A. 145.

The trial judge, however, *did not* "so instruct the jury." Instead, he instructed the jury as follows:

"Now in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder. There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement

was made.

"And the same instructions, of course, apply to any statements in argument which were made by Mr. Smith on behalf of the defendant, if any, you feel there be, statements which he made in his argument which were not supported by the evidence which you heard here during the trial of the cause. In short, the opening statement of counsel or the arguments of counsel at the conclusion of the case are not evidence for your consideration."<sup>19</sup> (A. 143, 144.)

There can be no serious question as to the impropriety of the statements made by the prosecutor in his closing argument. The statements were clearly in violation of every pertinent proscription in the *A.B.A. Standards relating to the Prosecution Function*, Part I, 1.1 (c) (d) (e), and Part V, 5.8; *A.B.A. Code of Professional Responsibility, Ethical Consideration* 7-13; and see *Professional Responsibility: Report of the Joint Conference*, 44 A.B. A.J. 1159, 1218 (1958); H. Drinker *Legal Ethics* 148 (1953).

The statements were in violation of the teachings of *Berger v. United States*, 295 U.S. 78, 88 (1935); *Viereck v. United States*, 318 U.S. 236, 247, 248 (1943); *New York Cent. R. Co. v. Johnson*, 279 U.S. 310 (1928); *Harris v. United States*, 402 F.2d 656 (D.C. Cir. 1968); *Hall v. United States*, 419 F.2d 580, 581, 584-588 (5th Cir. 1969); *United States v. Cotter*, 425 F.2d 450 (1 Cir. 1970); *Bowers v. Coiner*, 309 F. Supp. 1064, 1071, 1072 (S.D.W.Va. 1970); *Horner v. State of Florida*, 312 F. Supp. 1291, 1295-1296 (M.D. Fla. 1967), *aff'd*, 398 F.2d 880 (5th Cir. 1968);

<sup>19</sup> The trial judge still did not "emphasize . . . that the argument had been grossly improper." *Commonwealth v. Cabot*, 241 Mass. 131, 150-151. To compound the error, he equated the prosecutor's highly improper argument with "statements . . . if any, you feel there be," made by the counsel for the defendant.

*Patriarca v. United States*, 402 F.2d 314, 321 (1 Cir. 1968), cert. den.; and *Greenberg v. United States*, 280 F.2d 472 (1 Cir. 1960).

If the instant case had been tried in the federal courts in the same fashion, it is submitted that the remarks of the prosecutor would have compelled reversal by an appellate court in the exercise of its supervisory powers. (See, Circuit Judge Campbell in his dissent, A.243.)

The statements of the prosecutor were not merely improper, but were so seriously prejudicial as to deny the respondent his Fourteenth Amendment right to a fair trial and to his right of confrontation. See *Frazier v. Cupp*, 394 U.S. 731, 736 (1939).

The Fourteenth Amendment guarantees that every citizen shall not be deprived of his "life or liberty, without due process of law."

The essence of due process of law is "fundamental fairness." E.g., *Chambers v. State of Mississippi*, 93 S.Ct. 1038 (1973); *Estes v. State of Texas*, 381 U.S. 532, 542, 543 (1965).

Some courts have indicated that the expression of individual belief by a prosecutor is permissible so long as the belief "is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced justifying that belief." See *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955); *Thompson v. United States*, 272 F.2d 919 (5th Cir. 1959); *Schmidt v. United States*, 237 F.2d 542, 543 (8th Cir. 1956).

Other courts adhere to the absolute proscription against personal opinions contained in the Canon of Ethics "not only because counsel would then in effect be a witness not under oath or subject to cross examination, but because the false issue of credibility of counsel with the government

having the advantage would be injected." *Patriarca v. United States*, 402 F.2d 314, 321 (1st Cir. 1968), *cert. den.*; *United States v. Cotter*, 425 F.2d 450 (1st Cir. 1970); *Harris v. United States*, 402 F.2d 656 (D.C. Cir. 1968).

In those courts where expressions by the prosecutor as to his belief of the guilt of the accused have been held not to be prejudicial, there has been the caveat that the expression of belief is permissible so long as it was based solely on the evidence introduced and that the jury was not led to believe that there was other evidence personally known to the prosecutor not introduced in evidence justifying that belief. *Schmidt v. United States*, 237 F.2d 542, 543 (8th Cir. 1956).

In this case the prosecutor led the jury to believe that there was evidence known to the prosecutor but not introduced into evidence justifying his statements that:

- (1) "We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances." (A. 121.)
- (2) "DeChristoforo had a cocked Rohm derringer<sup>19a</sup> ready to administer another shot if that became necessary." (A. 123.)
- (3) The prosecutor *knew* that it was a *myth* that Frank Oreto or Gagliardi was carrying two guns. (A. 124.)
- (4) DeChristoforo was clever enough that he did not "have guns that can ever be traced to (him)." (A. 127.)
- (5) "There is no doubt in this case, none whatsoever," and that the prosecutor "honestly and sincerely believe(d) that you people feel that way." (A. 130, 131.)

<sup>19a</sup> The evidence was that the derringer was only "half-cocked". To make it fire, its hammer would have to be "drawn fully to the rear" (A. 74, 75).

- (6) The prosecutor did not "know what they (the respondent) want you to do by way of a verdict . . . I quite frankly think that they hope you will find him guilty of something a little less than first degree murder." (A. 129.)

As this court has recognized "some remarks included in an opening or closing statement could be so prejudicial that a finding of error or even *constitutional error*, would be unavoidable." (Emphasis supplied.) *Frazier v. Cupp*, 394 U.S. 731, 736 (1969). The respondent submits that the cumulative effect of the prosecutorial misconduct which occurred here is "sufficient to constitute reversible constitutional error . . . (which) would warrant federal habeas relief." *Frazier v. Cupp*, supra at 737; see also *Bowers v. Coiner*, 309 F. Supp. 1064 (S.D.W.Va. 1970); *Horner v. Florida*, 312 F. Supp. 1292 (M.D. Fla. 1967) aff'd 398 F.2d (5th Cir. 1968).

## II.

THE PROSECUTOR IN HIS CLOSING ARGUMENT VIOLATED THE PRINCIPLES OF *Miller v. Pate*, 386 U.S. 1 (1967) BY REPRESENTING TO THE JURY THAT THE RESPONDENT WAS SEEKING TO HAVE THE JURY RETURN A VERDICT OF "SOMETHING A LITTLE LESS THAN FIRST DEGREE MURDER," A FACT WHICH HE KNEW NOT TO BE TRUE.

The respondent contends that the denial of his right to a fair trial guaranteed him by the Due Process Clause of the Fourteenth Amendment was compounded when the prosecutor, knowing that the fact had no basis in truth, represented to the jury that the respondent was seeking to be convicted of something "a little less than first degree murder" and as a consequence, had in effect admitted his guilt to something "a little less than first degree murder."



At the time that the trial judge announced to the jury that the co-defendant Gagliardi had pleaded guilty, the jury must have wondered to some extent why Gagliardi pleaded guilty and DeChristoforo did not. There were only two alternatives: either DeChristoforo had not sought to plead, or, he had sought to do so unsuccessfully. See *DeChristoforo v. Donnelly*, supra, (A. 239).

In this setting the prosecutor, with full knowledge that the respondent at no time had sought to plead guilty to any offense and had at all times insisted upon trial (A. 235), and with the background of prior prejudicial statements made by him, told the jury that "I quite frankly think that they (respondent and his counsel) hope you find him guilty of something a little less than first degree murder."

The inference that both Gagliardi and DeChristoforo had offered to plead to something "a little less than first degree murder" and that Gagliardi's plea had been accepted but that DeChristoforo's offer was rejected, seems inescapable.

In short, the inference was that DeChristoforo had conceded his guilt.

If there was any doubt about this inference, the prosecutor later in his argument eliminated it by saying: "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way . . .". (A. 130, 131.) The cumulative effect of these and prior prejudicial remarks coupled with the jury's knowledge that the co-defendant had just pleaded guilty, invited the jury to conclude that the respondent had conceded his guilt and that this was within the personal knowledge of the prosecutor.

In the light of this, it can hardly be said, as the petitioner suggests, that "the improper remark causes only a possible improper inference with respect to a collateral issue. . .". (Brief for Petitioner, p. 22.)

The petitioner argues "... it makes no sense to infer that the prosecutor would accept a plea of guilty from a co-defendant who had shot the victim and refuse to accept a plea from another defendant who did not shoot the victim." (Petitioner's Brief, p. 24.)

Respondent submits that this argument is fallacious. In his argument the prosecutor indicated to the jury why a plea by DeChristoforo which, of course, was never made, was not acceptable, vis-a-vis that of Gagliardi or Oreto. He said:

"(DeChristoforo), more than anybody else, I think, is more reprehensible than the other two combined, because this was the man who supposedly was the friend of Joseph Lanzi.

"He is, in fact, a traitor to his friends. He is a murderer of his friends—pure and simple." (A. 131.)

At any event, even if the defendant had offered to plead guilty to a lesser offense, that fact would have been inadmissible. See *DeChristoforo v. Donnelly*, supra, and the cases collected at n. 6 (A. 241.)

Thus this Court has before it a situation where a state prosecutor, despite the fact that he knew it was untrue, strongly suggested to the jury that the defendant had offered to plead guilty to "something a little less than first degree murder."

In reaching the conclusion that DeChristoforo did not receive a fair trial, the Court of Appeals stated:

"(f)or a prosecutor to convey, or even to permit, a false impression, invades the area of due process. *Miller v. Pate*, 1967, 386 U.S. 1; *Hamric v. Bailey*, 4 Cir., 1967, 386 F.2d 390." *DeChristoforo v. Donnelly*, supra, (A. 248.)

Petitioner, in his brief, attempts to distinguish the instant case from *Miller* and *Hamric* by arguing that: "There is absolutely nothing in the instant record to support the inference that the prosecutor deliberately or wilfully misrepresented what he knew not to be true." (Pet. Brief p. 22).

However, the record is to the contrary.<sup>20</sup> In the Court of Appeals the prosecution and defense stipulated that:

"At no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial." (A. 235.)

As the Court of Appeals pointed out:

"We may now ask how a prosecutor who had given contemplative thought to the matter could honestly believe that a defendant who had seen his co-defendant who had fired the shots allowed to plead to second degree, but made no attempt to plead himself, was risking first degree simply in the hope of getting "something a little less." Whether wisely or not, petitioner must have been hoping for something a lot less. Even if the prosecutor's statement here were to be charged, charitably, to thoughtlessness, in a first degree murder case there must be some duty on a prosecutor to be thoughtful. Moreover, good faith is not determinative. As the Court pointed out in *Brady v. Maryland*, 1963, 373 U.S. 83, at 87, (a suppression of favorable evidence case, which the Court construes *pari passu* with affirmative falsity),

'[T]he suppression by the prosecution of evidence favorable to an accused upon request vio-

<sup>20</sup> The prosecutor had in effect stated, without any basis in the record therefor, that he had knowledge that neither Oreto nor Gagliardi carried two guns and also that he had knowledge that respondent was the type of person who carried guns that could not be traced to him.

lates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

'The principle of *Mooney v. Holohan* [294 U.S. 103] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.'

*See also United States v. Giglio*, 1972, 405 U.S. 150, 153-54." *DeChristoforo v. Donnelly*, 473 F.2d 1236, 1240 (A. 242, 243.)

Petitioner also attempts to distinguish the instant case from *Miller* and *Hamric* by arguing that the prosecutor's remarks, even if considered to be a misrepresentation, were not "such as to materially affect the fact-finding process." However, nothing could be further from the truth. After all, what remark could be more damaging to a defendant in a criminal trial than a prosecutor's remark falsely suggesting that the defendant had, in essence, conceded his guilt?

There can be little doubt that the prosecutor's remarks were, at least, "false" in the sense that they were misleading. Accordingly, the judgment of the Court of Appeals should be affirmed. *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957).

### III.

THE PROSECUTOR WHO IN EFFECT TESTIFIED THAT THE RESPONDENT HAD OFFERED TO PLEAD TO "SOMETHING A LITTLE LESS THAN FIRST DEGREE MURDER," VIOLATED THE RESPONDENT'S CONSTITUTIONAL RIGHT OF CONFRONTATION.

Due process of law contemplates that an accused shall have "as a minimum, a right to examine witnesses against him." *In re Oliver*, 333 U.S. 257, 273 (1948.)

"A right of confrontation is 'implicit in the concept of ordered liberty' . . . reflected in the Due Process Clause of the Fourteenth Amendment, independent of the Sixth". *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring).

This Court has held that the Confrontation Clause of the Sixth Amendment was "made obligatory on the States by the Fourteenth Amendment" and that the same standards must be applied "whether the right is denied in federal or state proceedings." *Pointer v. Texas*, 380 U.S. 400, 404, 407 (1965).

The Confrontation Clause of the Sixth Amendment requires that "(In) all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

In construing that clause this Court has held that "a primary interest secured by it is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

In *Pointer v. Texas*, 380 U.S. 400, 405, (1965) the Court said: "The right of cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's Constitutional goal."

The Confrontation Clause is not merely limited to those who give testimony from the witness stand but necessarily applies to all statements, declarations, and testimony which reach the jury and which may be adverse to the accused. *Parker v. Gladden*, 385 U.S. 363, (1966), and see *Barber v. Page*, 390 U.S. 719 (1968).

Consequently, the right of confrontation and cross-examination extends to all available persons whose declarations are used against the accused. *Smith v. Illinois*, 390 U.S. 129 (1968). Cf. *California v. Green*, 399 U.S. 149, 173, 186, 187 (1970), (Harlan, J., concurring), *Chambers v. State of Mississippi*, 93 S.Ct. 1038, 1045-1046 (1973).

In *Parker v. Gladden*, 385 U.S. 363, 364 (1966) this Court held that there was a denial of due process where a bailiff, an officer of the state, made statements to the jury that the defendant was guilty, as those statements were "not subjected to confrontation, cross-examination or other safeguards." Similarly, here, not only did the prosecutor express his personal belief in the defendant's guilt but he suggested that he had knowledge of matters unknown to the jury by strongly and falsely indicating to the jury that the defendant had offered to plead, "something which, by the great weight should not be told even when true." *DeChristoforo v. Donnelly*, 473 F.2d 1236, 1240 and cases cited at n.6 (A. 236, 241.)

In effect, the prosecutor in his closing argument not only testified against the defendant but knowingly testified falsely. This Court has recognized that because a prosecutor is a representative of a sovereignty his "... insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused where they properly should carry none." *Berger v. U.S.*, 295 U.S. 78 88 (1935). Clearly, the false inferences to be drawn from the prosecutor's "testimony" were prejudicial and may well have had an effect upon the jury. See *Chapman v. State of California*, 386 U.S. 125 (1967); *Turner v. State of Louisiana*, 379 U.S. 466 (1965) citing *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). If a prosecutor should not make any assertions of personal knowledge he certainly should not make any false insinuations and assertions. Cf. *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967); *Giglio v. United States*, 405 U.S. 150 (1972).

In *Douglas v. Alabama*, 380 U.S. 415, 419 (1965) this Court held that "since the [state] Solicitor was not a witness, the inferences from his [questions] . . . could not be tested by cross-examination" and that therefore the de-

fendant was denied "the right of cross-examination secured by the Confrontation Clause." Similarly, here the prosecutor's closing statements and the false inferences to be drawn therefrom were effectively insulated from any form of cross-examination or even rebuttal. As in *Douglas*, the prosecutor's statements "may well have been the equivalent in the jury's mind of testimony." Here, however, the respondent was doubly prejudiced by his inability to cross examine the prosecutor in that the impression deliberately conveyed by the prosecutor was utterly without foundation.

In this case the prosecutor's personal endorsement of the respondent's guilt was necessarily and substantially buttressed by the prosecutor's "frank" but false remarks which strongly implied that the defendant had admitted his guilt to the prosecutor by offering to plead. Just as *Douglas* was "a case of prosecutorial misconduct," (*California v. Green*, 399 U.S. 149, 187 n.20 (Harlan J. concurring)) the prosecutor's deliberately false "testimony" herein did even greater violence of the defendant's right to a fair trial. For the prosecutor to knowingly convey a false impression by means of his own statements, without affording the defendant an opportunity to cross-examine him or to rebut such testimony necessarily violated the defendant's Fourteenth Amendment right to due process. *Douglas v. Alabama*, 380 U.S. 415 (1965); *Miller v. Pate*, 386 U.S. 1 (1967); *Horner v. Florida*, 312 F. Supp. 1292 (M.D. Fla. 1967) aff'd. 398 F.2d 880; *Bowers v. Coiner*, 309 F. Supp. 1064; (S.D.W.Va. 1970) and see *Chambers v. Mississippi*, 93 S.Ct. 1038 (1973). As the Court of Appeals in effect held, (A. 243), not only was there substantial prosecutorial misconduct, but also there was "a deprivation of the right of confrontation . . . which . . . would warrant federal habeas relief." *Frazier v. Cupp*, 394 U.S.

731, 737 (1969). As the Commonwealth apparently has conceded that the prosecutor's argument was not only improper but in some sense prejudicial to the defendant, (Petitioner's Brief p. 2, 26) the judgment of the Court below must be affirmed.

#### IV.

THE CONSTITUTIONAL ERROR IN THIS CASE CANNOT BE CONSIDERED HARMLESS WITHIN THE MEANING OF *Chapman v. California*, 386 U.S. 18 (1967).

The respondent contends that the prosecutorial misconduct constituted constitutional error which cannot be considered harmless beyond a reasonable doubt.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that "before a constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt" and that the burden of proving such error was harmless beyond a reasonable doubt is upon the "beneficiary" of such error. *Harrington v. California*, 395 U.S. 25 (1969).

Here, the Court of Appeals resolved the issue of harmless error thusly:

"The question must be, would a jury, wondering whether petitioner was an active participant, or such small fry that the others were indifferent to his presence, be affected by a "frank" remark by one in a position to know what hopes petitioner had revealed to him? We think the answer is yes.

If there can be any doubt about that, (and there were twelve jurors to ponder, and to point out the significance) this is a first degree murder case, the situa-



tion was created by a deliberate, and as we shall see, doubly unwarranted, act of the prosecutor, and we believe that fundamental fairness requires that the doubt be resolved in favor of petitioner." (A. 240)

Furthermore, the evidence against DeChristoforo was far from overwhelming. The Commonwealth having conceded that Gagliardi and Oretto fired the actual shots relied solely on circumstantial evidence to correct the respondent in a joint venture with them. (A. 150, 151). Evidence linking DeChristoforo to the crime of first degree murder consisted principally of the testimony of Officer Carr to the effect that DeChristoforo had told a false story. (A. 151, 18-20.) On cross-examination, however, evidence of prior inconsistent statements was introduced which would have warranted a jury in disbelieving that it was the respondent who had made the false statements. (A. 25-32) The only other direct evidence against the respondent was his presence in the automobile at the time when the officers stopped to question its occupants. To show consciousness of guilt, the prosecutor relied on evidence that the respondent, after leaving the scene, with the consent of the officers, was arrested some 18 months later at his grandmother's house, where he had been living continuously since the incident.<sup>21</sup> (A. 20; Tr. 803-806.)

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<sup>21</sup> In *Alberty v. United States*, 162 U.S. 499, 511 (1896) this Court observed:

"(I)t is not universally true that a man who is conscious that he has done a wrong will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper. Since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth but the righteous are as bold as a lion.' Innocent men sometimes

The prosecutor introduced into evidence a fully loaded derringer which was found on the floor of the automobile in front of where the respondent had been seated. However, other than his own unsworn statements in his closing argument, the prosecutor offered no evidence to directly link the gun to DeChristoforo or to the death of Lanzi.

Although the petitioner argues that the evidence against DeChristoforo was substantial, it was certainly no more substantial than the "circumstantial web of evidence" referred to in *Chapman v. State of California*, 386 U.S. 18, 25 (1967). Further, the petitioner has, *per force*, failed to establish "that the prosecutor's comments . . . did not contribute to (respondent's) convictions." *Chapman*, *supra*, at 26. Certainly his argument was "calculated to produce a . . . conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Moreover, neither the length of the prosecutor's argument, which lasted less than thirty minutes (Tr. 890, 915), and which was injected with improper remarks, nor the trial judge's instructions<sup>22</sup> render his comments

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hesitate to confront a jury; not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

It should also be noted that the respondent sought to prove that his flight was based on his fear for his life; however the proffered evidence was excluded. (Tr. 803-806.)

<sup>22</sup> As Chief Justice Tauro, in his dissenting opinion (A. 162), pointed out: "In the circumstances of this case the instructions were far from sufficient to overcome the serious damage done." Moreover, "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949). See also *Bruton v. United States*, 391 U.S. 123, 137 (1968) wherein this Court stated "we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross examination."

harmless as suggested by the petitioner (Pet. Br. 19).

The petitioner, in fact, admits that the prosecutor's closing arguments "may have interfered with the defendant's right to a fair trial" (Petitioner's Brief, p. 26). Nevertheless, the petitioner seems to argue that a state may subject an accused to an unfair trial and not violate his constitutional rights. This Court has consistently rejected any such proposition and has held that "a defendant is entitled to a fair trial. . ." *Bruton v. United States*, 391 U.S. 123, 135 (1968); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Estes v. State of Texas*, 381 U.S. 532, 543 (1965) and cases cited therein; *Chambers v. State of Mississippi*, 93 S.Ct. 1038, 1045 (1973).

The Fourteenth Amendment concept of due process mandates that an accused be given a trial that is at least fundamentally fair. See *Benton v. Maryland*, 395 U.S. 784, 794, 795 (1969). "Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927) (Emphasis added.) Accordingly, as the prosecutor's improper arguments "may have interfered with the defendant's right to a fair trial" or "had an effect on the outcome of the trial," they cannot be considered harmless error. *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959). The respondent submits that "in these circumstances prejudice to the cause of the accused is so highly probable that . . . (one could not be) justified in assuming its non-existence." *Berger v. United States*, 295 U.S. 78, 89 (1935).

### Conclusion

As this Court has constantly maintained, it is the duty of the federal courts to make their own independent examination of the record when federal constitutional deprivations are alleged and to determine whether an accused has been given a fair trial.

See *Napue v. Illinois*, 360 U.S. 264 (1959) and *Shambers v. Mississippi*, 93 S. Ct. 1038 (1973). The respondent submits that the prosecutor's improper and prejudicial remarks "under the facts and circumstances of this case . . . deprived (the respondent) of a fair trial." *Chambers v. Mississippi*, supra. Accordingly for the reasons stated above, the respondent urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1973

**ROBERT H. DONNELLY,**

*Petitioner,*

vs.

**BENJAMIN A. DeCHRISTOFORO,**

*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE IN SUPPORT OF RESPONDENT  
and  
BRIEF OF THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE**

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1973

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**No. 72-1570**

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**ROBERT H. DONNELLY,**

*Petitioner,*

vs.

**BENJAMIN A. DeCHRISTOFORO,**

*Respondent.*

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On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit.

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**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE IN SUPPORT OF RESPONDENT**

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*May it please the Court:*

The National Association of Criminal Defense Lawyers respectfully moves this Court for leave to file a brief *amicus curiae* in support of the Respondent in the captioned case. This motion is made pursuant to this Court's Rule 42. Respondent has consented to our filing; Petitioner has declined to consent to our participation. The interest of movant and a statement of our reasons for desiring to file a brief as *amicus curiae* are set forth below.

### **Interest of Movant**

The National Association of Criminal Defense Lawyers is composed of more than one thousand lawyers who are actively engaged in the practice of criminal law in at least forty-four States, in Puerto Rico, in the Virgin Islands and in the District of Columbia. The daily practice of their profession involves every stage and facet of the entire process of criminal justice in both State and Federal Courts. The discharge of their responsibility to the judicial system and to their clients has imparted to them a special sensitivity to the fact that preservation of an orderly society is largely dependent upon adherence to a high standard of professional responsibility and basic fairness in criminal litigation. They are convinced that an undeviating insistence upon maintenance of such standards on the part of both prosecution and defense will best serve the interests of the judicial system and of the society whose preservation is dependent upon that system.

It is the position of the Association that the Fourteenth Amendment mandates compliance by the States with the essentials of the Sixth Amendment Confrontation Clause.

The Association further believes that any meaningful false statement by a prosecutor to a jury, especially if wilfully made, must be viewed as a denial of due process.

The Association is further persuaded that the highest degree of professional responsibility must attend any presentation to a court of review. Any misrepresentation as to the recitations of the record creates an irrelevant collateral problem, the necessity for whose resolution necessarily dilutes the resources of the party thus impacted and diverts the Court from consideration of cases of other liti-

gants. Such misconduct occurs only in the calm and deliberate atmosphere of the brief-writing facility, and accordingly represents a completely inexcusable failure of professional responsibility. The members of the Association encounter this problem with sufficient frequency to warrant the hope that a forceful expression by this Court may tend to decrease the incidence of such activity.

**Movant's Reasons for Desiring to File Brief as Amicus in the Case at Bar**

Petitioner's Brief attacks every aspect of the judgment below. Respondent's counsel is professionally obligated to approach this case in the manner best calculated to protect the interests of Respondent as manifested by the special circumstances of the record before your Honors for review. Movant is deeply concerned that in these circumstances, the judgment below may be sustained on narrow grounds which might, in future cases, be cited contrary to the Court's intention as indicating a tolerance in circumstances less compelling than those here presented, for dilution of the principles above expressed.

Those principles are peculiarly vulnerable to erosion. Movant's member-lawyers view any challenge to those concepts as a matter of the gravest concern. Accordingly, at a meeting of Movant's Board of Directors on December 8, 1973, a resolution was adopted authorizing an application to this Court for leave to submit an *amicus* brief in this case.

Movant supports the position of the Respondent that the judgment below should not be disturbed. We further suggest that reconsideration of the order granting certiorari may be warranted by the special circumstances of this case.

Movant desires to present to your Honors the brief here appended, expressing its view that important considerations of broad public interest, threatening the basic concepts of due process, are involved in these proceedings.

Movant accordingly prays leave to file its brief appended hereto.

Respectfully submitted,

Melvin B. Lewis

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1973

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**No. 72-1570**

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**ROBERT H. DONNELLY,**

*Petitioner,*

VS.

**BENJAMIN A. DeCHRISTOFORO,**

*Respondent.*

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On Writ of Certiorari to the United States  
Court of Appeals for the First Circuit.

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**BRIEF OF THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE**

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**INTEREST OF AMICUS CURIAE**

Our interest is as set forth within the foregoing motion  
for leave to file this brief as *amicus curiae*.

**STATEMENT OF THE CASE**

Respondent and a co-defendant were on trial in a State  
court charged with murder in the first degree. At the con-  
clusion of the evidence, the co-defendant pleaded guilty  
to murder in the second degree (A. 98). The jury was in-

formed of the fact of the plea, but was not told that the charge had been reduced (A. 99).

The prosecutor's subsequent closing argument advised the jury that the offense was "in our judgment . . . one of the most savage killings that any jury could ever see anywhere under any circumstances." (A. 120) In the absence of any evidence that Respondent had possessed any of the guns found in the murder vehicle, he said that "You and I know that (it is) a myth" that all the guns had been carried by the other people then present (A. 124). Toward the end of his argument, he told the jury: "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way." (A. 130).

The most seriously challenged remark was:

"I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." (A. 129)

In the Court of Appeals, the prosecution argued that this remark "was directed to revealing apparent defense tactics." (State's Brief in Court of Appeals, p. 25) However, it was subsequently conceded that Respondent had never negotiated with the prosecution for acceptance of a plea to a lesser charge (A. 235, 241); and the prosecution has argued in this Court that "it makes no sense" to suggest that any such offer would not have been accepted by the prosecution. (Petition for Certiorari, p. 25; Petitioner's Brief, p. 24).

Respondent objected to the statement. The ruling on that objection is unclear (Cf. A. 155). The trial judge first stated "I don't think—" and then said "No" (perhaps

with other inaudible remarks), (A. 129, 133). The Supreme Judicial Court of Massachusetts "interpret(ed)" that statement "as agreement with defense counsel. . . ." (R. 155); on the other hand, the trial judge previously used the word "No" to overrule an objection. (A. 61)

On the conclusion of the prosecutor's argument, the trial was recessed for the day. Immediately upon its reconvening, Respondent moved for mistrial, citing the remarks above quoted (A. 132-133). The motion was denied (A. 134). The trial judge stated that "before the charge" (A. 134) he would give "such (curative) instructions to the jury in this regard as you wish me to" (A. 134). Counsel for respondent asked that the jury be told that the remark was improper, and that Respondent had always "maintained his complete innocence and in no way has indicated that he is willing or that he is seeking to have the jury find him guilty of a lesser offense." The judge replied "I will do so" (A. 135). However, that was never done.

The judge suggested that defense counsel write out the precise curative instruction desired (A. 135). Respondent thereupon filed the specific written request quoted in full at pages 12 and 13 of the Petition for Certiorari. (A. 145) However, that charge was not given. (A. 144) Instead, as a part of the general charge, the jury was instructed that arguments for neither side were to be regarded as evidence; that with regard to the challenged statement, "There is no evidence of that whatsoever, of course"; that the statement should be disregarded; and that the same applied to misstatements "if any" which may have been made by counsel for Respondent. (A. 143-144)

Petitioner was convicted of murder in the first degree, with a recommendation against capital punishment. Sentence was imposed accordingly. The Supreme Judicial Court of Massachusetts affirmed (A. 149) over a two-judge dissent (A. 162, 170). Respondent then sought habeas corpus in the United States District Court for the District of Massachusetts. The magistrate recommended that the writ be granted (A. 186-195). The District Judge overruled that recommendation and denied the petition (A. 231-232). The United States Court of Appeals for the First Circuit reversed the District Court judgment (A. 236), one judge dissenting (A. 243). This Court then granted the State's Petition for Certiorari.

### **SUMMARY OF ARGUMENT**

The prosecutor suggested to the jury that the Respondent desired to plead guilty to a lesser charge, but that the prosecutor was unwilling to agree. That suggestion was false in both aspects, and the prosecutor was aware of its falsity. Since it related to matter which was obviously within the direct personal knowledge of the prosecutor, the jury could not have considered it a mere statement of opinion. However, even viewed as an expression of opinion it constituted a wilful falsity, since the prosecutor confessed to having held the contrary opinion to that which he articulated. The verdict reflects adoption of the prosecutor's view by the jury.

Any statement by a prosecutor which is wilfully false and is material to the issue before the jury, constitutes a denial of due process of law. Such statements also deprive the defendant of the right of confrontation. That is particularly true when the statement is made in the course of the prosecutor's final argument, to which the defendant has no chance to reply.



However, it is not every such denial which will avoid a conviction. If the jury is informed of the falsity of the assertion, due process is assured; and the denial of confrontation becomes irrelevant, since the defendant thereby achieves everything that confrontation could have accomplished in his behalf.

The Petition for Certiorari tended to indicate that such instruction had been given to the jury. However, no such instruction was given. Instead, the jury were merely told to disregard that argument because it was not based on evidence. The intimation thus imparted to the jury was that the challenged statement may have been true, but was incompetent. Such an instruction cannot cure the constitutional denials resulting from the falsity of the prosecutor's assertion.

Principles of comity and deference to State determinations are inapplicable to this case. The State adjudication simply did not face the federal constitutional issue. It treated the problem as one of improper statement of a prosecutor's personal belief, and ignored the implications of the falsity of the prosecutor's assertion. The federal constitutional problems were faced only by the Court of Appeals, and were properly resolved there.

Nothing done by defense counsel justifies the falsehood uttered by the prosecutor. Moreover, no possible provocation could excuse the utterance of a deliberate falsehood.

## ARGUMENT

---

### I.

The prosecutor's statement that defendant's objective was a lessening of the degree of guilt and punishment rather than an acquittal, was a wilfully false and material assertion of fact.

To treat the prosecutor's statement as mere procedural error is to open constitutional floodgates.

The statement was not only clearly irrelevant and prejudicial; it was demonstrably false. As we shall show, the prosecutor knew it was false. It related to a matter which the jury must have known to be within the personal knowledge of the prosecutor. A determination of its constitutional acceptability will sweep almost four decades of unbroken principle into dust, give license to opportunism and effectively destroy a cherished value of our society.

Respondent was a passenger in an automobile containing three other persons. One of them was shot and killed. The prosecution conceded that the shooting was done by the other two in the car, and not by the Respondent (A. 123, Pet'n for Cert. p. 25).

Both of the men who fired the shots were permitted to plead guilty to murder in the second degree (A. 150), one of them during his joint trial with the Respondent (A. 98). The prosecution has argued to your Honors that "it makes not a whit of sense" to doubt that the Respondent could have had the same concession for the asking. (Pet'n for Cert. p. 25)

Respondent made no such request, entertained no such offer, and insisted upon a jury determination of his guilt. (A. 235)

Knowing all those facts, the prosecutor told the jury:

"I don't know what they (Respondent) want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." (A. 129)

The jury took him at his word. They found Respondent guilty of "something a little less than first-degree murder": first degree murder with a recommendation against imposition of the death penalty.

It is completely understandable that the jury would accept the prosecutor's statement. Only three people would necessarily know whether the Respondent had attempted to negotiate a plea: Respondent, his attorney and the prosecutor. Respondent and his attorney said nothing about that issue. The prosecutor did, and stood uncontradicted because he had the last word.

But the word was a falsity, and he knew it to be such. He did not "quite frankly think" that the Respondent wanted to be found guilty of "something a little less than first degree murder." Instead, he *knew* that the Respondent could have that for the asking; that the Respondent was aware that he could have it; and that Respondent had made no such request.

In short, the prosecutor *knew* that Respondent's objective was *not* a mere diminution of the charge, and that his contrary suggestion to the jury was a falsehood.

When matter is within the personal knowledge of the speaker, the qualifying phrase "I think" will not convert a falsehood into a possible truth, or a factual statement into an opinion. It will not even mitigate a perjury charge if the declaration is made under oath. The prosecutor's

statement cannot be treated as a mere expression of opinion by this Court, because he was speaking of a factual proposition concerning which he possessed direct personal knowledge. For that same reason, the jury must have treated it as a factual assertion.

The completely cynical quality of the prosecutor's position is apparent from his presentation in the Court of Appeals. In that Court, he argued that his "remark was directed to revealing apparent defense tactics." (State brief in Court of Appeals, p. 25) The only possible beneficiary of such relevations was the jury. The quoted brief was filed before that Court made the inquiry which elicited the fact that the "apparent defense tactic" had been imaginary. (A. 241, 235) It was only following that development, that the attempt to "reveal" to the jury the "apparent defense tactics" was converted into a mere expression of the prosecutor's opinion. (Cf. Pet'n for Cert. p. 16; Petitioner's Brief p. 23)

But the prosecutor could not have held even a bona fide opinion supporting the challenged assertion, because he *knew* that if a lesser charge had been Respondent's objective, Respondent had only to ask.

Thus, the prosecutor's assertion is a clear falsehood.

The prosecutor now argues that the jury could not possibly have believed his revelation as to "apparent defense tactics." Completely reversing his field in the light of the additional facts elicited by the Court of Appeals, he contends that his disclosure of the apparent was obviously incredible on its face:

"It makes not a whit of sense to accept a plea of guilty from a co-defendant who had shot the victim and refuse a plea from another defendant who admittedly did not shoot the victim." (Petition for Certiorari, page 25; accord, Brief for Petitioner, page 24)

But it makes a great deal of sense indeed to accept a plea from a simple triggerman, while refusing a plea from the architect of the murder plan.

And it was exactly that concept, completely inconsistent with the prosecutor's presentation in this Court, which he argued to the jury at the trial:

"And he (Respondent), more than anybody else, I think, *is more reprehensible than the other two combined*, because this was the man who supposedly was the friend of Joseph Lanzi (the victim). He is, in fact, a traitor to his friends. He is a murderer of his friend—pure and simple." (A. 131, emphasis added)

Having explained to the jury the supposed basis for the prosecution's special harshness toward Respondent, who was then pictured as "more reprehensible than the other two combined," the prosecution now argues to this Court that its assertions were harmless because Respondent was obviously less culpable than either of the others.

In that posture, the Petitioner apparently feels free to contend:

"(T)here is absolutely nothing in the instant record to support the inference that the prosecutor deliberately or willfully misrepresented what he knew not to be true." (Brief for Petitioner, page 22)

The facts disclosed by this record will impart to that assertion such force as your Honors may deem it to have.

. . .

We have pursued at some length a demonstration of the falsity of the prosecutor's statements, because of the paramount importance of that proposition. The Court of Appeals awarded relief to Respondent because of that falsity (A. 241-242). To excuse that falsity would diminish a cherished value of professional responsibility, and place

a premium upon successful explorations of the boundaries of due process. It would cast a dark shadow over the doctrine of *Brady v. Maryland* (1963), 373 U.S. 83. It would impair the pride and confidence of every citizen. And its message to the cynical and to the opportunistic would be one of encouragement.

## II.

Considerations of comity and federalism are inapplicable to this case, because the State Court declined to pursue the federal constitutional implications of the prosecutor's false statement.

The Petitioner (prosecution) apparently views this case as presenting only the question whether an expression of the prosecutor's personal belief constitutes a denial of due process. The Petition for Certiorari suggested that this was a case in which a technically improper argument, fully rectified by curative instructions, had been elevated artificially to the level of fundamental unfairness, thereby violating principles of comity and federalism. Petitioner's brief pursues the same approach, urging that only a matter of State procedure is involved "against a Due Process backdrop." (p. 18) Although the Court of Appeals agreed with the State court that a personal expression of the prosecutor's belief in a defendant's guilt is not a denial of due process (A. 238), the Petitioner flogs that dead horse mercilessly, while giving only the most fleeting attention to the true basis of the opinion below: "Affirmative falsity" of the prosecutor's statements. (A. 242) The main thrust of Petitioner's argument (Brief, pp. 24-30) is dedicated to the proposition that the Court of Appeals' application of the principle of *Brady v. Maryland* amounted to nothing more than "imposing federally preferred procedural rules upon state tribunals." (Brief, p. 25)

*Brady* enunciates something far transcending any consideration of procedure. It expresses the bedrock of constitutional safeguard in state proceedings. It is the most significant single civilizing influence in criminal jurisprudence. Never before has it been suggested that the conceded right of the states to experiment in the administration of criminal justice extends across the borders of *Brady*.

Nevertheless, the Petitioner has suggested that the propriety of the trial proceedings should be resolved "in terms of sheer numbers." Including the trial judge, eight judges have held that Respondent received a fair trial; only four have held that he did not. Respondent therefore loses, 8 to 4. (Pet'n for Cert., p. 25)

That death blow to the whole theory of appellate jurisprudence omits consideration of one important factor: The Court of Appeals was considering an issue which the State judiciary had declined to pursue (A. 241). That issue was the effect of the falsity of the prosecutor's statement to the jury.

Although from the very outset the Respondent expressed more concern with the falsity of the prosecutor's statement than with the procedural problem of the expression of the prosecutor's "opinion" as such (A. 129, 135, 145), the Massachusetts Court considered only the latter proposition (A. 154-155).

It was only the Court of Appeals which thought it necessary to pass upon Respondent's contention that he had been denied due process by reason of the false statement made to the jury. (A. 241-243)

To adopt Petitioner's system of adjudication, Respondent wins on that point, 2 to 1. . . .

Comity and federalism do not and cannot even theoretically require deference to a State action which *ignores* a federal constitutional claim. Such action would be abdication rather than federalism. If the fact that a State court "declined to pursue" (A. 241) a federally-based claim can foreclose inquiry on federal habeas corpus, then the entire spectrum of federal rights becomes unenforceable in state proceedings.

### III.

**Any deliberately false and material statement by a prosecutor is a denial of due process.**

We have stated our proposition in modest terms.

The Court of Appeals noted (A. 242) that *Brady v. Maryland* (1963), 373 U.S. 83, denounces suppression of exculpatory evidence as a denial of due process "irrespective of the good faith or bad faith of the prosecution." The court below construed suppression of favorable evidence "pari passu with affirmative falsity" (A. 242).

It would indeed be anomalous to hold that the due process clause forbids a State prosecutor from suppressing exculpatory evidence, but does not prevent him from sponsoring or uttering outright falsehoods.

Nobody could doubt the materiality of the prosecutor's statement. It was, of course, completely incompetent, even if it had been truthful and offered by a witness subject to procedural safeguards. But it was material, in that it bore very directly upon the Respondent's guilt. Was he such small fry that others were willing to commit murder in contemptuous disregard of his presence, or so major a criminal actor that the prosecution would refuse him the



clemency extended to the actual triggermen? Did he consider himself to be guilty of the charge? The prosecutor's comment answered both questions, falsely.

In terms of due process, this case is on no different footing from that which it would occupy if the prosecutor had corruptly hired a witness to take the stand and testify falsely that Respondent had tried to plead guilty to a lesser charge but had been rebuffed. (In terms of the right of confrontation, that course would have been a lesser invasion of Respondent's rights; he would at least have been able to cross-examine the witness.)

This Court has made it clear that the format of a constitutional violation and the device by which it is accomplished are irrelevant. *Douglas v. Alabama* (1964), 380 U.S. 415. This Court has also stated that the Fourteenth Amendment will not "tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate* (1967), 386 U.S. 1.

To hold that a prosecutor may not knowingly introduce false evidence under formal procedural safeguards, but may utter deliberate falsities in argument where the defendant has no right of confrontation or response, would be to create a distinction which is logically insupportable.

If the concept of due process will tolerate a distinction among deliberate falsehoods, we would urge that the prosecutor's personal comments are more likely to be believed by a jury, and are therefore more noxious than those which he presents from the witness stand.

## IV.

A deliberate falsehood need not result in mistrial or reversal. However, a curative instruction in such a situation is ineffective unless it advises the jury of the falsity of the assertion.

The Petitioner has argued vigorously that the trial court's instruction to "consider the case as though no such statement was made" (A. 144) removed any prejudice resulting from the challenged remark. (Petition for Certiorari, pp. 21-22) Petitioner urges that "in analyzing the effect of the prosecutor's remarks, particular stress must be placed upon the trial judge's curative instructions . . . ." (Pet'n for Cert., p. 21)

Petitioner stops short of drawing explicitly the conclusion necessarily derived from that proposition: A deliberately false statement is constitutionally acceptable if the jury is given routine instructions to disregard those comments.

An instruction designed to obviate the denial of a federal constitutional right should render that denial harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 24.

This Court has taken a realistic view of the "unmitigated fiction" that a routine instruction to disregard or limit consideration of evidence is sufficient to remove the prejudicial effect of dramatic and incompetent matter. *Bruton v. United States* (1968), 391 U.S. 123; *Jackson v. Denno* (1964), 378 U.S. 368.

The vice of the prosecutor's comment, as recognized by Respondent's challenge (A. 135), was its falsity. The trial judge at first agreed to instruct the jury that the assertion was untrue (A. 135), and Respondent formally requested

such action (A. 145). However, the instruction went no further than to tell the jury that they should consider only the sworn evidence in the case; that lawyers' arguments on both sides were not evidence (A. 143); and that they should disregard the prosecutor's statement that Respondent desired a guilty finding on a lesser charge because "there is no evidence of that whatsoever, of course." (A. 144)

In telling the jury to disregard the comment because the prosecutor had not made formal proof of what he had said, the trial judge certainly did not obviate the prejudice engendered by the prosecutor's falsehood. To the contrary, he may well have reinforced the prosecutor's credibility, although without so intending. The judge, who in the jury's view might well have had knowledge of Respondent's supposed attempt to negotiate a plea, told the jury to disregard the statement because no witness had testified to the matter. Presumably, it was irrelevant and objectionable, rather than untrue; if it had been untrue, a juror might logically expect the judge to say so in that situation.

The false proposition was never refuted in the presence of the jury, nor did any opportunity for such refutation exist except through the instruction which was first promised and then withheld.

We believe that a curative instruction can be effective to remove the adverse effect of deliberate misrepresentation. However, such an instruction cannot cure the falsehood unless it informs the jury that the challenged assertion was false.

Apparently, Petitioner agrees. Petitioner very properly emphasizes the importance of curative instructions (Pet'n for Cert., p. 21). Perhaps for the purpose of showing your Honors what should have been done, the Petitioner *quoted in full*, at pages 12 and 13 of the Petition for Certiorari,

the jury instruction tendered by Respondent and *refused* by the trial judge. (A. 145) After fully reciting this *refused* instruction, the Petitioner continued: "Immediately prior to the giving of the charge. . . ." (Pet'n for Cert., p. 13) The juxtaposition of the refused instruction with "the giving of the charge" might well have caused this Court to believe that Respondent's proffered curative instruction had been given. We think it very important that your Honors should know that this instruction was *not* given. Had it been given, the jury would have been advised of the falsity of the prosecutor's representation. In that circumstance, this *amicus* believes that the falsity would not have amounted to a denial of due process.

We do not consider it necessary that we comment further on the presentation made at pages 12 and 13 of the Petition for Certiorari, other than to characterize it as unfortunate.

## V.

**Any assertion of fact made to a jury of a criminal case, is subject to the Sixth Amendment right of confrontation. A statement by a prosecutor in his summation which recites a proposition of fact not shown by the evidence is a denial of that right.**

The Court of Appeals properly concluded that "the prosecutor, in effect, testif(ied)" against Respondent (A. 243).

As a witness, the prosecutor enjoyed a unique privilege: He was neither cross-examined nor rebutted. Respondent had no right to ask him questions, and no right to respond to him in any manner; for the prosecutor was then exercising his privilege to have the last word.

In a criminal case, the prosecutor always has the last word. He is given that right because he has the burden of proof.

But that burden is a light one indeed, if proof can be introduced through the device of summation. For with respect to such "proof" a defendant has no greater right of confrontation than that possessed by any spectator.

The Sixth Amendment right of confrontation applies in State criminal proceedings. *Pointer v. Texas* (1965), 380 U.S. 400. It extends not only to testimonial presentations, but to any information received by the jury from the prosecutor or any other source. *Douglas v. Alabama* (1965), 380 U.S. 415; *Parker v. Gladden* (1966), 385 U.S. 363.

Implicit in that right is the privilege to cross examine any person who directly provides the information to the jury. *Chambers v. Mississippi* (1973), 410 U.S. 284, 295. That right would have been of special value in this case, since its exercise would probably have demonstrated the total falsity of the fact thus asserted. The assertion here challenged bore none of the "indicia of reliability" such as were found to justify relaxation of the confrontation standard in *Dutton v. Evans* (1970), 400 U.S. 74, 89. To the contrary, the petitioner now concedes that the assertion was completely unreliable.

Whatever may be the present reach of the confrontation clause in State proceedings, it clearly encompasses the denial demonstrated by this record. Accordingly, this case furnishes no appropriate vehicle for considering whether denial of confrontation constitutes grounds for collateral attack in a less noxious context.

## VI.

On the record of this case, it is unnecessary to determine whether defense provocation can justify prosecutive misrepresentations. However, we would urge that there is no conceivable defense tactic to which a prosecution may appropriately respond by use of falsehood.

Petitioner seeks to excuse the foregoing state of affairs by pointing to "a provocative argument by defense counsel." (Brief, p. 19) Even if defense argument can be said to justify deliberate prosecutive misconduct—and we know of no such suggestion in any prior decision—the defense argument in this case furnishes no arguable excuse for retaliatory dishonesty. Any contrary holding would tend strongly to chill all reasonable argument of inferences on behalf of a defendant, through fear of providing a pretext for the type of false statements which the Petitioner seeks to defend.

Petitioner reprints (Brief, pp. 8-9) those portions of the argument by Respondent's counsel which he believes to have "provoked" the prosecutor into falsehood. (Accord, *Pet'n for Cert.* p. 18) They amount to nothing more than:

- (a) A completely proper argument that the jury should infer, from proven circumstances, that Respondent's flight was motivated by fear rather than by consciousness of guilt. (The Massachusetts court not only found no impropriety in that argument, but deemed it to have a curative effect with respect to any possible claim of deficiency in the trial court's instructions on that issue, A. 158)
- (b) A completely proper argument that there had been no showing of ill-will between Respondent and the victim. (At page 18 of the Petition for Certiorari, the Petitioner contends that this comment specifi-

cally "precipitated" the totally unrelated statement by the prosecutor that Respondent's objective was to be convicted of a lesser charge than first-degree murder!)

- (c) An argument that Respondent had not fired a gun. That argument was so well-founded in the evidence that the prosecutor conceded it to be correct (A. 123).
- (d) A statement that "I believe . . . I represent and argue to you" that there is a doubt as to Respondent's guilt.

If those arguments justify a false statement by the prosecutor, then it is hard to imagine any argument that would not. We ask that this Court reject that contention as specious. We urge that no conceivable act of misconduct can justify deliberate falsehood as retaliation. If this Court should not agree, we confidently urge that justification should not be found unless the provocation surpasses by several orders of magnitude the weak excuses presented here.

Petitioner also suggests that the prosecutor's statement might be justified by the *opening* statement of Respondent's counsel. (Brief, p. 6) If that were so, it would represent a reaction sufficiently delayed to deprive the prosecutor's claimed retaliatory instinct of all claim to spontaneity. But there is no showing of impropriety in that opening statement. It dealt with nothing more than permissive inferences from evidence actually introduced (R. 67, 72, 85-86, 88, 91, 96); with evidence actually offered and excluded by the prosecutor's objection during the testimony of Respondent's grandmother (Tr. 804-806); and with the statement actually made to the jury by Respondent (R. 140-142). (Whatever the status of that statement, it was properly offered for the jury's consideration.)



Finally, Petitioner suggests that his misconduct should be overlooked because "No specific curative objection was requested immediately. . . . Rather, *on the following morning* . . . counsel moved for a mistrial . . ." (Brief, p. 11, italics copied). But in terms of court time, the motion was made only seconds after the completion of the prosecutor's argument. Court adjourned for the day immediately on conclusion of the prosecutor's argument, and the motion for mistrial was made as soon as it reconvened. (R. 131-132; Tr. 914-918) The trial judge stated that he would have denied a motion for mistrial if one had been made immediately (R. 133). He expressly limited his curative instruction to the lack of evidenciary relevancy of the prosecutor's comment (A. 144), and refused a timely tender of a proper curative instruction demonstrating the falsity of that disguised testimony (A. 145). In these circumstances, there is no legitimate state interest in denying Respondent relief because of a lack of timeliness of his objection. *Henry v. Mississippi* (1965), 379 U.S. 443, 447. The Massachusetts Court treated Respondent's objections as timely and considered them on the merits (R. 154-156). The suggestion that Respondent should be denied relief for lack of timeliness in objecting is completely untenable, and is only that of the Petitioner, not the Massachusetts judiciary.

If the claimed provocation relied on in this case is deemed sufficient justification for prosecutive dishonesty, there will be no effective redress from such improprieties. For in the record of almost any criminal case a stronger "provocation" than is here claimed to exist can be found and used after the fact as an excuse for any prosecutive misconduct which might have occurred.



**CONCLUSION**

"Society wins not only when the guilty are convicted but when criminal trials are fair," *Brady v. Maryland* (1962), 373 U.S. 83, 87. Conversely, society is threatened with a serious loss if the position of the Petitioner were to be accepted in any degree. To do so would imperil the basic integrity of the adjudicative process, with an inevitable consequent diminution of the public respect for that process.

It has been some seven years since this Court stated:

"More than thirty years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney v. Holohan*, 294 U.S. 103. There has been no deviation from that established principle. There can be no retreat from that principle here." (*Miller v. Pate*, 1967, 386 U.S. 1)

The record of this cause amply demonstrates that this most salutary principle still merits and requires this Court's vigilant attention.

Respectfully submitted,

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## Syllabus

## DONNELLY v. DeCHRISTOFORO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

No. 72-1570. Argued February 20, 1974—Decided May 13, 1974

During the course of a joint first-degree murder trial, respondent's codefendant pleaded guilty to second-degree murder, of which the trial court advised the jury, stating that the trial against respondent would continue. In his summation, the prosecutor stated that respondent and his counsel had said that they "hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." Respondent's counsel objected and later sought an instruction that the remark was improper and should be disregarded. In its instructions, the trial court, after re-emphasizing the prosecutor's statement that his argument was not evidence, declared that the challenged remark was unsupported, and admonished the jury to ignore it. Respondent was convicted of first-degree murder. The State's highest court ruled that the prosecutor's remark, though improper, was not so prejudicial as to warrant a mistrial and that the trial court's instruction sufficed to safeguard respondent's rights. The District Court denied respondent's petition for a writ of habeas corpus. The Court of Appeals reversed, concluding that the challenged comment implied that respondent, like his codefendant, had offered to plead guilty to a lesser offense, but was refused and that the comment was thus potentially so misleading and prejudicial as to deprive respondent of a constitutionally fair trial. *Held*: In the circumstances of this case, where the prosecutor's ambiguous remark in the course of an extended trial was followed by the trial court's specific disapproving instructions, no prejudice amounting to a denial of constitutional due process was shown. *Miller v. Pate*, 386 U. S. 1; *Brady v. Maryland*, 373 U. S. 83, distinguished. Pp. 642-648.

473 F. 2d 1236, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion, in which WHITE, J.,

joined, *post*, p. 648. DOUGLAS, J., filed a dissenting opinion, in Part II of which BRENNAN and MARSHALL, JJ., joined, *post*, p. 648.

*David A. Mills*, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the brief were *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, and *Barbara A. H. Smith*, Assistant Attorneys General.

*Paul T. Smith* argued the cause for respondent. With him on the brief were *Harvey R. Peters* and *Jeffrey M. Smith*.\*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was tried before a jury in Massachusetts Superior Court and convicted of first-degree murder.<sup>1</sup> The jury recommended that the death penalty not be imposed, and respondent was sentenced to life imprisonment. He appealed to the Supreme Judicial Court of Massachusetts contending, *inter alia*, that certain of the prosecutor's remarks during closing argument deprived him of his constitutional right to a fair trial. The Supreme Judicial Court affirmed.<sup>2</sup> That court acknowledged that the prosecutor had made improper remarks, but determined that they were not so prejudicial as to require reversal.

Respondent then sought habeas corpus relief in the United States District Court for the District of Massachusetts. The District Court denied relief, stating:

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\**Melvin B. Lewis* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae*.

<sup>1</sup> Respondent and his codefendants were also indicted for illegal possession of firearms, and respondent received a four- to five-year sentence on that charge. The conviction is in no way related to the issues before the Court in this case.

<sup>2</sup> — Mass. —, 277 N. E. 2d 100 (1971).

"[T]he prosecutor's arguments were not so prejudicial as to deprive [DeChristoforo] of his constitutional right to a fair trial."<sup>3</sup> The Court of Appeals for the First Circuit reversed by a divided vote.<sup>4</sup> The majority held that the prosecutor's remarks deliberately conveyed the false impression that respondent had unsuccessfully sought to plead to a lesser charge and that this conduct was a denial of due process. We granted certiorari, 414 U. S. 974 (1973), to consider whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights. We hold they were not and so reverse.

## I

Respondent and two companions were indicted for the first-degree murder of Joseph Lanzi, a passenger in the car in which the defendants were riding. Police had stopped the car at approximately 4 a. m. on April 18, 1967, and had discovered Lanzi's dead body along with two firearms, one of which had been fired. A second gun, also recently fired, was found a short distance away. Respondent and one companion avoided apprehension at that time, but the third defendant was taken into custody. He later pleaded guilty to second-degree murder.

Respondent and the other defendant, Gagliardi, were finally captured and tried jointly. The prosecutor made little claim that respondent fired any shots but argued that he willingly assisted in the killing. Respondent, on the other hand, maintained that he was an innocent passenger. At the close of the evidence but before final argument, Gagliardi elected to plead guilty to a charge of second-degree murder. The court advised the jury that

<sup>3</sup> App. 231.

<sup>4</sup> 473 F. 2d 1236 (1973).

Gagliardi had pleaded guilty and that respondent's trial would continue.<sup>5</sup> Respondent did not seek an instruction that the jury was to draw no inference from the plea, and no such instruction was given.

Respondent's claims of constitutional error focus on two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury. The first involved the expression of a personal opinion as to guilt,<sup>6</sup> perhaps offered to rebut a somewhat personalized argument by respondent's counsel. The majority of the Court of Appeals agreed with the Supreme Judicial Court of Massachusetts that this remark was improper, but declined to rest its holding of a violation of due process on that remark.<sup>7</sup> It turned to a second remark that it deemed "more serious."

The prosecutor's second challenged comment was directed at respondent's motives in standing trial: "They [the respondent and his counsel] said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder."<sup>8</sup> Respondent's counsel objected immediately to the statement and later sought an instruction that the remark was improper and should

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<sup>5</sup> The trial court stated:

"Mr. Foreman, madam and gentlemen of the jury. You will notice that the defendant Gagliardi is not in the dock. He has pleaded 'guilty,' and his case has been disposed of.

"We will, therefore, go forward with the trial of the case of Commonwealth vs DeChristoforo." App. 99.

<sup>6</sup> The challenged remark was that "I honestly and sincerely believe that there is no doubt in this case, none whatsoever." *Id.*, at 130.

<sup>7</sup> The Court of Appeals noted: "[A]t least the jury knows that the prosecutor is an advocate and it may be expected, to some degree, to discount such remarks as seller's talk." 473 F. 2d, at 1238.

<sup>8</sup> App. 129.

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## Opinion of the Court

be disregarded.<sup>9</sup> The court then gave the following instruction:

"Closing arguments are not evidence for your consideration. . . .

"Now in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney.

"Consider the case as though no such statement was made."<sup>10</sup>

The majority of the Supreme Judicial Court of Massachusetts, though again not disputing that the remark was improper, held that it was not so prejudicial as to require a mistrial and further stated that the trial judge's instruction "was sufficient to safeguard the defendant's rights."<sup>11</sup> Despite this decision and the District Court's denial of a writ of habeas corpus, the Court of Appeals found that the comment was potentially so misleading and prejudicial that it deprived respondent of a constitutionally fair trial.

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<sup>9</sup> No instruction was sought at the time although the court apparently was willing to give one. The trial judge later told counsel:

"[H]ad there been a motion made by you at that time to have me instruct the jury along the lines of eliminating that from their minds, or something of that nature, I certainly would have complied, because I did consider at the time the argument was beyond the grounds of complete propriety, but certainly far from being grounds for a mistrial." *Id.*, at 133.

<sup>10</sup> *Id.*, at 143-144.

<sup>11</sup> — Mass., at —, 277 N. E. 2d, at 105.

The Court of Appeals reasoned that the jury would be naturally curious about respondent's failure to plead guilty and that this curiosity would be heightened by Gagliardi's decision to plead guilty at the close of the evidence. In this context, the court thought, the prosecutor's comment that respondent hoped for conviction on a lesser offense would suggest to the jury that respondent had sought to plead guilty but had been refused. Since the prosecutor was in a position to know such facts, the jury may well have surmised that respondent had already admitted guilt in an attempt to secure reduced charges. This, said the Court of Appeals, is the inverse of, but a parallel to, intentional suppression of favorable evidence. The prosecutor had deliberately misled the jury, and even if the statement was made thoughtlessly, "in a first degree murder case there must be some duty on a prosecutor to be thoughtful."<sup>12</sup> Therefore, the District Court had erred in denying respondent's petition.

## II

The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court."<sup>13</sup> We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U. S. 219, 236 (1941). We stated only this Term in *Cupp v. Naughten*, 414 U. S. 141 (1973), when reviewing an instruction given in a state court:

"Before a federal court may overturn a conviction

<sup>12</sup> 473 F. 2d, at 1240.

<sup>13</sup> *Id.*, at 1238.



resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."<sup>14</sup>

This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, *Argersinger v. Hamlin*, 407 U. S. 25 (1972), or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. *Griffin v. California*, 380 U. S. 609 (1965).<sup>15</sup> When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention.

Conflicting inferences have been drawn from the prosecutor's statement by the courts below. Although the Court of Appeals stated flatly that "the prosecuting attorney turned Gagliardi's plea into a telling stroke against [DeChristoforo]"<sup>16</sup> by implying respondent had

<sup>14</sup> 414 U. S., at 146.

<sup>15</sup> Respondent does suggest that the prosecutor's statements may have deprived him of the right to confrontation. See *Pointer v. Texas*, 380 U. S. 400 (1965). But this argument is without merit, for the prosecutor here simply stated his own opinions and introduced no statements made by persons unavailable for questioning at trial.

<sup>16</sup> 473 F. 2d, at 1239.

offered to plead guilty as well, the dissent found the inference to be "far less obvious."<sup>17</sup> The Supreme Judicial Court of Massachusetts stated that it considered the same argument illogical:

"It is not logical to conclude that the jury would accept any implied argument of the prosecutor that, because one of the men whom the defendant blamed for the murder had pleaded guilty, the defendant was any less firm in his assertion that he himself was not guilty of any crime whatsoever."<sup>18</sup>

Thus it is by no means clear that the jury did engage in the hypothetical analysis suggested by the majority of the Court of Appeals, or even probable that it would seize such a comment out of context and attach this particular meaning to it. Five Justices of the Supreme Judicial Court of Massachusetts and at least one federal judge have all confessed difficulty in making this speculative connection.

In addition, the trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case. The prosecutor, as is customary, had previously told the jury that his argument was not evidence,<sup>19</sup> and the trial judge specifically re-emphasized that point. Then the judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it.<sup>20</sup> Although some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character.

<sup>17</sup> *Id.*, at 1241 (Campbell, J., dissenting).

<sup>18</sup> App. 157.

<sup>19</sup> *Id.*, at 119.

<sup>20</sup> See n. 10, *supra*.

In *Cupp v. Naughten*, *supra*, the respondent had challenged his conviction on the ground that a "presumption of truthfulness" instruction, given by the state trial court, had deprived him of the presumption of innocence and had shifted the State's burden of proof to himself. Holding that the instruction, although perhaps not advisable, did not violate due process, we stated:

"In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd v. United States*, 271 U. S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool v. United States*, 409 U. S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction."<sup>21</sup>

Similarly, the prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process.

<sup>21</sup> 414 U. S., at 146-147.

## III

We do not find the cases cited by the Court of Appeals to require a different result. In *Miller v. Pate*, 386 U. S. 1 (1967), the principal case relied upon, this Court held that a state prisoner was entitled to federal habeas relief upon a showing that a pair of stained undershorts, allegedly belonging to the prisoner and repeatedly described by the State during trial as stained with blood, was in fact stained with paint. In the course of its opinion, this Court said:

"It was further established that counsel for the prosecution had known at the time of the trial that the shorts were stained with paint. . . .

". . . The record of the petitioner's trial reflects the prosecution's consistent and repeated misrepresentation that People's Exhibit 3 was, indeed, 'a garment heavily stained with blood.'" *Id.*, at 6.

A long series of decisions in this Court,<sup>22</sup> of course, had established the proposition that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Id.*, at 7. The Court in *Miller* found those cases controlling.

We countenance no retreat from that proposition in observing that it falls far short of embracing the prosecutor's remark in this case. The "consistent and repeated misrepresentation" of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed

<sup>22</sup> See, e. g., *Mooney v. Holohan*, 294 U. S. 103 (1935); *Napue v. Illinois*, 360 U. S. 264 (1959).

*in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

The Court of Appeals' reliance on *Brady v. Maryland*, 373 U. S. 83 (1963), is likewise misplaced. In *Brady*, the prosecutor had withheld evidence, a statement by the petitioner's codefendant, which was directly relevant to the extent of the petitioner's involvement in the crime. Since the petitioner had testified that his codefendant had done the actual shooting and since the petitioner's counsel was not contesting guilt but merely seeking to avoid the death penalty, evidence of the degree of the petitioner's participation was highly significant to the primary jury issue. As in *Miller*, manipulation of the evidence by the prosecution was likely to have an important effect on the jury's determination. But here there was neither the introduction of specific misleading evidence important to the prosecution's case in chief nor the nondisclosure of specific evidence valuable to the accused's defense. There were instead a few brief sentences in the prosecutor's long and expectably hortatory closing argument which might or might not suggest to a jury that the respondent had unsuccessfully sought to bargain for a lesser charge. We find nothing in *Brady* to suggest that due process is so easily denied.

The result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in *Miller* and *Brady*, *supra*, to

amount to a denial of constitutional due process.<sup>23</sup> Since we believe that distinction should continue to be observed, we reverse the judgment of the Court of Appeals.

*It is so ordered.*

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

I agree with my Brother DOUGLAS that, when no new principle of law is presented, we should generally leave undisturbed the decision of a court of appeals that upon the particular facts of any case habeas corpus relief should be granted—or denied. For this reason I think it was a mistake to grant a writ of certiorari in this case, and I would now dismiss the writ as improvidently granted.

We are bound here, however, by the “rule of four.” That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits. If as many as four Justices remain so minded after oral argument, due adherence to that rule requires me to address the merits of a case, however strongly I may feel that it does not belong in this Court. See *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521, 559 (separate opinion of Harlan, J.).

Upon this premise, I join the Court’s opinion.

MR. JUSTICE DOUGLAS, dissenting.

The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as pos-

<sup>23</sup> We do not, by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts, by admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it. We only say that, in the circumstances of the case, no prejudice amounting to a denial of constitutional due process was shown.

sible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial. As stated by the Court in *Berger v. United States*, 295 U. S. 78, 88:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We have here a state case, not a federal one; and the prosecutor is a state official. But we deal with an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the States are bound. *Chambers v. Mississippi*, 410 U. S. 284; *Sheppard v. Maxwell*, 384 U. S. 333; *Turner v. Louisiana*, 379 U. S. 466; *Irvin v. Dowd*, 366 U. S. 717.

In this case respondent was charged with first-degree murder and was convicted in the state court by a jury. At no time did he seek to plead guilty to a lesser offense. It is stipulated:

"[A]t no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth



seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial."

A codefendant pleaded guilty to second-degree murder and the jury was advised of the fact.

As to the guilt of respondent the prosecutor told the jury: "I honestly and sincerely believe that there is no doubt in this case, none whatsoever."

And he went on to say: "I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder."

These statements in the setting of the case and in light of the fact that the jury knew the codefendant had pleaded guilty to second-degree murder, are a subtle equivalent of a statement by the prosecutor that respondent sought a lesser penalty. Counsel for respondent immediately objected but the court at the time did not admonish the prosecutor or tell the jury to disregard the statement, though it did cover the matter later in its general instructions.

# I

As a matter of federal law the introduction of a withdrawn plea of guilty is not admissible evidence, *Kercheval v. United States*, 274 U. S. 220. As a matter of procedural due process the Confrontation Clause of the Sixth Amendment, applicable to the States by reason of the Fourteenth Amendment, *Pointer v. Texas*, 380 U. S. 400, would bar a person from testifying that the defendant had sought a guilty plea unless the right of cross-examination of the witness was afforded, *id.*, at 406-408. That requirement of procedural due process should be sedulously enforced (save for the recognized exceptions of dying declarations and the like, *id.*, at 407) lest the theory that the end justifies the means gains further footholds here. The prosecutor is not a witness; and he should not be permitted to add to the record either by subtle



or gross improprieties. Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial. The assurance of the Court that we make no retreat from constitutional government by today's decision has therefore a hollow ring.

Activist judges have brought federal habeas corpus into disrepute at the present time. It is guaranteed by the Constitution. It is a built-in restraint on judges—both state and federal; and it is also a restraint on prosecutors who are officers of the court. Our activist tendencies should promote not law and order, but *constitutional law and order*. Judges, too, can be tyrants and often have been. Prosecutors are often eager to take almost any shortcut to win, yet as I have said they represent not an ordinary party but We the People. As I have noted, their duty is as much "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one," *Berger v. United States, supra*, at 88.

It is, I submit, quite "improper" for a prosecutor to insinuate to the jury the existence of evidence not in the record and which could not be introduced without the privilege of cross-examination.

## II

The Supreme Judicial Court of Massachusetts had difficulty with this case when it came before it on direct appeal, two Justices, which included the Chief Justice, dissenting.\* *Commonwealth v. DeChristoforo*, —

\*Chief Justice Tauro said in dissent:

"The prosecutor's argument in the instant case permitted or perhaps even suggested an inference that the defendant had conceded his guilt and was merely hoping for something a little less than a verdict of murder in the first degree. This diminished his

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Mass. —, 277 N. E. 2d 100. The Court of Appeals was also divided, 473 F. 2d 1236. Our federal district courts and courts of appeals are much closer to law administration in the respective States than are we in Washington, D. C. They are responsible federal judges who know the Federal Constitution as well as we do. Their error in issuing the Great Writ—or in refusing to do so—would in my judgment have to be egregious for us to grant a petition for certiorari. When a court of appeals honors the Constitution by granting the Great Writ or in its solemn judgment denies it, we should let the matter rest there, save for manifest error.

I would affirm the judgment below.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would affirm the judgment below for the reasons stated in Part II of the dissent of MR. JUSTICE DOUGLAS.

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chance for a fair trial to a far greater degree than would have the publication in a newspaper of his criminal background. Unlike a newspaper, the prosecutor ostensibly speaks with the authority of his office. The prosecutor's 'personal status and his role as a spokesman for the government tend[ed] to give to what he . . . [said] the ring of authenticity . . . tend[ing] to impart an implicit stamp of believability.' *Hall v. United States*, 419 F. 2d 582, 583-584 (5th Cir.). The prosecutor's remarks probably called for a mistrial. In any event the judge's failure to instruct the jury adequately and with sufficient force to eliminate the serious prejudice to the defendant constitutes fatal error. Moreover, the judge's routine final instructions to the jury were far from sufficient to correct the error. By then the defendant's position had so deteriorated that his chances for a fair deliberation of his fate by the jury were virtually eliminated." — Mass., at —, 277 N. E. 2d, at 112.